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IN THE SUPREME COURT OF THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner,*

v.

GARY BRADLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal habeas corpus court grant relief to a state prisoner on the basis of its own conclusion that, contrary to the ruling of the state court, state law required jury instructions on an affirmative defense at the prisoner's trial?

2. May a federal habeas corpus court consider, in determining the prejudicial effect of a trial error, affidavits from trial jurors asserting how they otherwise would have voted?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

W. A. DUNCAN, WARDEN, *Petitioner,*

v.

GARY BRADLEY

PETITION FOR WRIT OF CERTIORARI

Warden W. A. Duncan hereby petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the district court's grant of habeas corpus relief to state prisoner Gary Bradley.

JURISDICTION

The judgment of the Court of Appeals issued on December 24, 2002, and re-hearing was denied on May 14, 2003. This Court has jurisdiction over the instant petition, filed timely within ninety days of the denial of rehearing. 28 U.S.C. §§ 1254(1), 2101(c); Sup. Ct. R. 13.1, 13.4.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Duncan* v. *Bradley*, 315 F.3d 1091 (9th Cir. 2002), and is reprinted in Appendix A to this petition. The report of the magistrate judge, and the judgment of the district court adopting it, are unpublished, and are reprinted in Appendices B and C. The opinion of the California Court of Appeal in *People* v. *Bradley* is unpublished, and excerpts from it are reprinted in Appendix F.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in part,

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Section 2254(a) of Title 28 of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

Section 2254(d) provides, in pertinent part,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> . . . .
> . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Federal Rule of Evidence 606(b) provides,

> Inquiry into validity or verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotion as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether any extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

1. In 1996, two undercover policemen approached Jose Flores and asked him for help in buying drugs. Flores sought out respondent Gary Bradley; and Bradley, in turn, obtained some cocaine and delivered it to Flores and the policemen for twenty dollars. The officers then arrested Bradley for selling the cocaine.

At his first trial in the California superior court, Bradley presented a defense of "entrapment," based upon his own testimony and other evidence that the police had dealt with him through an intermediary whose sickly appearance played on Bradley's sympathies. As recognized in cases such as *People* v. *Reliford*, 28 Cal.4th 647 (2002), entrapment under California law is not a question of the defendant's subjective criminal intent or disposition; it is instead an objective question, as to which the defendant bears the burden of proof, of whether the police conduct would have induced even a "normally law-abiding person" to commit the crime. The trial judge instructed the jury on entrapment, and the jury deadlocked 11-to-1 in favor of a verdict of guilt.

In Bradley's re-trial, a different judge determined that the evidence—although much the same as in the first trial given that the prosecution relied on Bradley's testimony from that trial—was insufficient to raise the entrapment defense. In the absence of entrapment instructions, the new jury found Bradley guilty, and the court sentenced him to a "three strikes" recidivist term of life imprisonment.

On appeal, Bradley argued that the evidence sufficed under state law to require the entrapment instructions. But the California Court of Appeal held that there was no "substantial" evidence, as required by state law, to support instructions on the defense. Instead, the evidence showed a "run of the mill" undercover operation involving a decoy in which the policemen "did not conduct themselves improperly" by badgering or cajoling. The appellate court declined to take judicial notice of affidavits, submitted by Bradley, in which two jurors asserted that entrapment instructions would have changed the verdict. App. F4-F7.

In a petition for discretionary review to the California Supreme Court, Bradley argued that state law required the instructions and that failure to give them therefore violated the United States Constitution too. The California Supreme Court denied review without comment.

2. Bradley initiated federal habeas corpus proceedings, and the district court granted relief on his entrapment-instruction claim. The Ninth Circuit affirmed in a 2-to-1 opinion authored by Judge Ferguson. Disagreeing with the state appellate court, and asserting that the state court had engaged in an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), the panel majority opined that the evidence at trial indeed had been sufficient to support the state-law entrapment defense so as to require the instructions. The panel discerned what it viewed as cajoling on the part of the decoy Flores. And it disputed the state court's evaluation of what a "normally law abiding person" would have done under such circumstances. As the federal panel saw it, the California courts had "ignored the purpose" of the California policy reflected in the California entrapment defense. In addition, the panel opined that California "law of the case" doctrine also required the judge in the re-trial to adhere to the ruling of the judge who had given the instructions in the first trial. App. A5-A10.

The majority then held that refusing the state-law instructions had violated Bradley's federal due-process right to present "any recognized defense," a right assertedly recognized by this Court in *Mathews* v. *United States*, 485 U.S. 58 (1988), and *California* v. *Trombetta*, 467 U.S. 485 (1984). Further, the majority deemed the constitutional violation to be prejudicial in light of the prior deadlock and affidavits from two jurors claiming that the jury otherwise would have voted to acquit. From there, the majority finally concluded that the state appellate court's opinion could be discarded, even under AEDPA[1/] amendments to 28 U.S.C. § 2254(d), because the state decision had amounted to an "unreasonable application of clearly-established federal law." App. A10-A15.

Judge Graber dissented. In her view, the majority's grudging AEDPA analysis repeated mistakes for which this Court already had criticized the Ninth Circuit. She concluded

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217.

that federal courts lacked authority to second-guess California courts on state-law questions, and that the AEDPA deferential standard of review prohibited relief because no Supreme Court precedents required the defense instructions as a constitutional matter in state cases. App. A18-A27.

The Warden's petition for re-hearing, and hearing en banc, was denied. App. E1. Bradley has been released from prison custody pending this appeal.

REASONS FOR GRANTING THE WRIT

I.

Certiorari is warranted to review the Ninth Circuit's holding that federal habeas corpus relief may be granted on the basis of its own determination, contrary to that of the state courts, that the trial judge violated state law by declining to instruct the petitioner's jury on a state-law affirmative defense of "entrapment."

Certiorari should be granted because the Ninth Circuit's opinion, basing habeas corpus relief upon the omission of instructions on a state-law affirmative defense of entrapment, conflicts with many of this Court's clear precedents. This Court broadly has recognize that federal courts may not override state-court rulings on questions of state law and that federal habeas corpus relief may not be predicated upon mere errors of state law. And it has expressed grave doubt about the propriety of federal relief on state affirmative-defense claims specifically. The Ninth Circuit's holding, that the federal Constitution guarantees instructions on state-law affirmative defenses, also conflicts with decisional law in other Circuits. And, in any event, it violates this Court's well-established doctrine prohibiting the retroactive invocation of debatable "new rules" of law to grant relief in habeas corpus cases.

A. *The Ninth Circuit's treatment of alleged state-law error as the basis for discerning a violation of the Constitution conflicts with decisions of this Court.*

1. In *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 & n. 2, 71-72 (1991), this Court reversed the Ninth Circuit's grant of habeas corpus relief to a California prisoner, explaining that the Circuit had exceeded the proper scope of federal habeas corpus by premising relief on its own conclusion, in contradiction of the ruling of the California appellate court, that the trial judge had committed an error under state law that had prejudicially affected the result of the petitioner's trial. In reversing *McGuire*, this Court also was constrained to reach out and repudiate a similar excess of power by the Ninth Circuit in the earlier case of *Blair* v. *McCarthy*, 881 F.2d 602 (9th Cir. 1989). *McGuire*, at 69 n. 2. *McGuire* in this way enforced long-standing Supreme Court doctrine restricting federal second-guessing of state-court interpretations of state law and, more important, limiting habeas corpus relief to federal constitutional claims rather than mere state-law claims. See *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ based upon a perceived error of state law."); *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held state courts are the ultimate expositors of state law . . . ."); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"); see *id.* ("We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied").

As evidenced by the 2-to-1 majority opinion in this case, however, this Court's *McGuire* message has worn off in the Ninth Circuit. As Judger Graber properly condemned in her dissent, the majority opinion below explicitly rejected the

California Court of Appeal's legal conclusion that the evidence at Bradley's trial had not made out a case of the state-law affirmative defense of entrapment. App. A6-A9. The panel further perceived an additional state-law error under what it incorrectly and eccentrically conjured to be California "law of the case" doctrine governing jury instructions in the retrial of a criminal case. See App. A9-A10, A26-A27; *People* v. *Watson*, 22 Cal.4th 200, 223 (2000). Compounding that second-guessing, the majority then granted relief, in essence, to vindicate a mere state-law affirmative defense not otherwise required by the Constitution.[2/]

The vice of the Ninth Circuit's opinion in this regard is not simply that it got state law wrong yet again—although the Circuit's errors in this regard have created much mischief in California. See, e.g., *People* v. *Box*, 23 Cal.4th 1153, 1188 fn. 7 (2000) (rejecting misinterpretation of California law employed by Ninth Circuit to grant habeas corpus relief in *Wade* v. *Terhune*, 202 F.3d 1190 (9th Cir. 2000)); *People* v. *Santamaria*, 8 Cal.4th 903, 923 (1994) (rejecting misinterpretation of California law employed by Ninth Circuit to grant habeas corpus relief in *Pettaway* v. *Plummer*, 943 F.2d 1041 (9th Cir. 1991)); *In re Robbins*, 18 Cal.4th 770, 793 (1998) (rejecting misinterpretation of California law employed by Ninth Circuit

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2. In ruling that the California state courts erred in their application of state law, the Ninth Circuit invoked 28 U.S.C. § 2254(d)(2)—an exception to the general AEDPA rule prohibiting habeas corpus relief that is triggered where the state-court adjudication of the merits of a federal claim "was based on an unreasonable determination of the facts." The panel majority never claimed, however, that Congress had intended to overturn *McGuire* through § 2254(d)(2). Nor is there a basis for any such suggestion. The statutory language in Congress' AEDPA habeas-corpus reforms in every respect appear to restrict and nowhere appear to expand the availability of the writ for state prisoners. Moreover, 28 U.S.C. § 2254(a) provides that habeas corpus relief may be granted to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Not surprisingly, then, no court in the nation has held that AEDPA diminishes the force of the principles announced in *McGuire*.

in habeas corpus case of *Ashmus* v. *Calderon*, 123 F.3d 1199 (9th Cir. 1997)). The worse harm is that granting federal habeas corpus relief to a state prisoner on a state-law claim violates Congress' habeas corpus plan and undermines federalism and State-federal comity. The insult is particularly sharp where, as Judge Graber pointed out in her criticism of the majority opinion, the federal court has actually overridden state-court rulings on state-law questions. Unless reviewed, the Ninth Circuit's opinion will open the doors to numerous similar challenges based on alleged state-law errors, with similarly deleterious results, in the future.

2. Certiorari is justified, further, because the Ninth Circuit adopted, under a "right to present a defense" rubric, a due-process rule as to which this Court has expressed grave doubt. According to the Ninth Circuit, the Constitution requires jury instructions on state-law affirmative defenses that embrace facts beyond the elements of the charged crime. In *Gilmore* v. *Taylor*, 508 U.S. 333, 343 (1993), however, this Court rejected a prisoner's claim that his due-process rights were violated because the instructions at his trial had frustrated the jury's consideration of evidence supporting his state-law affirmative defense. This Court's *Taylor* opinion, to be sure, was based in significant part on the habeas corpus policy ground that the prisoner's claim impermissibly sought the retroactive application of a "new rule" of law. See *Teague* v. *Lane*, 489 U.S. 288, 310 (1988) (plurality op.). But the opinion also clearly indicates that the Constitution did not require that rule anyway. See *Thomas* v. *Peters*, 48 F.3d 1000, 1009-1010 (7th Cir. 1995) (Easterbrook, J., concurring) (discussing *Taylor*).

Refusing to apply the line of cases developed under *In re Winship*, 397 U.S. 358 (1970), which recognized the prosecution's due-process burden of proving the elements of the charged crime beyond a reasonable doubt, the *Taylor* Court explained that "the most that can be said of the instructions given at respondent's trial is that they created a risk that the jury would fail to consider evidence that related to an *affirmative defense, with respect to which* Winship's *due process guarantee*

does not apply." 508 U.S. at 343 (emphasis added). In reaffirming that the due-process rules governing the state's proof of the elements of a crime, see *Jackson* v. *Virginia*, 443 U.S. 307 (1979) (federal review of sufficiency of evidence of elements of state-law crimes), do not extend to state-law affirmative defenses comprising additional facts that do not merely negate the existence of those elements, this Court cited its precedents allowing the States to place upon defendants the burden of proving such defenses. *Id.* (citing *Martin* v. *Ohio*, 480 U.S. 228 (1987)); *Patterson* v. *New York*, 432 U.S. 197 (1977); see *Engle* v. *Isaac*, 456 U.S. 107, 119-121 (1982) (treating claim of error in instruction on a state-law affirmative defense as not cognizable in habeas corpus); but see *id.*, at 341. *Taylor* distinguished, from the different context of state-law affirmative defenses in non-capital cases, Supreme Court precedents recognizing a special need to allow the jury to consider mitigating evidence as "constitutionally relevant" under the Eighth Amendment at the sentencing phase of a death-penalty case. *Id.*, at 342. *Taylor* also distinguished this Court's other precedents, insofar as they recognized a due-process right to "a meaningful opportunity to present a complete defense," as exclusion-of-evidence cases that did not involve restrictions on a defendant's ability to present state-law "affirmative defenses." *Id.*, at 343. And *Taylor* recognized that expanding the "right to present a defense" cases to cover jury instructions on State affirmative defenses "would make a nullity of the rule reaffirmed in *Estelle* v. *McGuire* . . . that instructional errors of state law generally may not form the basis of federal habeas relief." *Id.*, at 344.

So, just as it disobeyed *McGuire*, the Ninth Circuit opinion below ignored this Court's jurisprudence, as reflected in *Taylor*, on state-law affirmative defenses. Moreover, in holding that federal law "clearly established" a constitutional rule requiring proper instructions on state-law affirmative defenses, App. A14-A15, the opinion below invoked a "new rule" of the very kind that *Taylor* itself recognized to be impermissible under this Court's habeas corpus non-retroactivity doctrine. See *Williams*

v. *Taylor*, 529 U.S. 362, 412 (2000) (equating AEDPA "clearly established federal law"standard with "new rule" standard); see generally *Lambrix* v. *Singletary*, 520 U.S. 518, 527-528 (1997); *Teague* v. *Lane*, 488 U.S. at 310. See fn. 4, *post*.

It is true, as this Court indicated in *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973), that state-law error in jury instructions, and perhaps other trial procedures or rulings that coincidentally violate state law, also might render a trial fundamentally unfair and violate due process. Accord, *Estelle* v. *McGuire*, 502 U.S. at 72. But it hardly follows from *Naughten* that a mere state-law error—an error that by definition affects only protections that the Constitution treats as unnecessary—can be "bootstrapped" into a fundamental due-process violation simply because the error impairs some non-constitutional interests that might be perceived as valuable or desirable or otherwise affects the trial result. See *id.* ("It must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some constitutional right'") (citing *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974)); *Allen* v. *Redman*, 858 F.2d 1194 (6th Cir. 1988) (discussing *Naughten*). The question in this case is whether *Naughten* should be read to mean, unremarkably, that a procedure unauthorized by state-law may warrant federal habeas corpus relief if it also is condemned under a specific provision of the Constitution—or whether, as the Ninth Circuit would have it, *Naughten* instead means that an error impairing an affirmative defense that only the State guarantees is itself fundamentally unfair so as to be condemned by the Constitution.

Although the panel below denied that it was granting the writ for state-law error, App. A10, the protest is untenable. Nothing in the panel's opinion—and, certainly nothing in this Court's cases—purports to enshrine California's entrapment defense as a constitutional right for all criminal defendants nationwide. See *United States* v. *Russell*, 411 U.S. 423, 433 (1973) (entrapment defense is "not of constitutional dimension"); see also *Mathews* v. *United States*, 485 U.S. at 66. Instead, the panel went to great lengths to establish that, in its

view, it was the specific entrapment defense recognized by California law that had been raised by the evidence in petitioner's case, and that the failure to instruct on that affirmative defense had affected the result. App. A5-A9. The true theory of the panel's grant of relief—the formula of "state-law error" on affirmative defenses equals "unfairness" equals "violation of Constitution"—is functionally indistinguishable from the theory it tried to disclaim. If *Naughten* indeed supports that formula, federal habeas corpus courts then would function as super state appellate courts—a novel proposition indeed and one that would appear to conflict with the rule in *Estelle* v. *McGuire*. In addition, to base a finding of unconstitutional unfairness simply in the violation of the law of one State would be tantamount to constitutionalizing the policies of that State for the rest of the country as well.

The panel in this case relied on *Mathews* v. *United States*, 485 U.S. 58, and *California* v. *Trombetta*, 467 U.S. 485, to find a violation of Bradley's "right to present a defense." App. A10-A11. But neither case validates the panel's holding. Although involving instructions on entrapment as defined in federal criminal law, and stating that the defendant is entitled to instructions on defenses made out by the evidence, *Mathews* appears at most to be merely an exercise of this Court's supervisory powers over the federal courts rather than an interpretation of the Constitution. Cf. *Goeke* v. *Branch*, 514 U.S. 115 (1995). *Trombetta* involved, not instructions on an affirmative defense, but a claim of intentional destruction of exculpatory evidence that might have negated the existence of an element of the charged crime itself.

B. *In treating instructional errors impairing state-law affirmative defenses as violations of the Constitution, the Ninth Circuit opinion conflicts with decisions in other Circuits.*

1. The Ninth Circuit's opinion conflicts with decisional law in other Circuits. In the Third Circuit case of *Johnson* v. *Rosemeyer*, 117 F.3d 104 (3d Cir. 1997), for example, the petitioner claimed that the state judge in his homicide trial had erroneously introduced "added elements" to the jury instructions on his state-law defense of "justification" for the use of deadly force. Noting that *Estelle* v. *McGuire* prohibited relief for mere state-law error, the Third Circuit in *Johnson* observed that the petitioner was seeking to circumvent *McGuire* by arguing—like Bradley in the case at bar—that the alleged instructional error violated due process "because it deprived him of an opportunity to present his defense." *Id.*, at 109. The Third Circuit discerned, however, that the claim would be cognizable only if the instructional error relieved the state of its constitutional obligation to prove an element of the crime or "if it deprived the petitioner of *a defense the state had to afford him under federal law.*" *Id.*, at 110. The appellate court explained,

> Johnson's problem is that he cannot point to a federal requirement that jury instructions on the elements of an offense when justification is at issue must include particular provisions, *nor can he demonstrate that the jury instructions deprived him of a defense which federal law provided to him.*

Id. (emphasis added). Absent an independent requirement that States must afford such a defense as a federal constitutional matter, the *Johnson* court concluded that the instruction claim in essence concerned merely a question of state law that could not be addressed in federal habeas corpus proceedings. *Id.* at 110-111; see *Ellis* v. *Hargett*, 302 F. 3d 1182, 1188-1189 (10th Cir. 2002) (claim that self-defense instructions on self-defense

had violated Oklahoma law was "not cognizable in a federal habeas action"); cf. *Smith* v. *Horn*, 120 F.3d 400 (3d Cir. 1997) constitution requires proper instruction on justification where it negates malice element of offense). Indeed, as *Johnson* also correctly perceived, the question whether state law was violated is *irrelevant* to the habeas corpus court's determination of whether the instructions violated the Constitution. *Johnson*, at 111-113.

2. In several other Circuits, opinions on this issue go both ways—further highlighting the need for this Court's intervention. Compare *Taylor* v. *Withrow*, 288 F.3d 846 (6th Cir. 2002) (relief based on error in self-defense instructions) with *Wood* v. *Marshall*, 790 F.2d 548, 551 (6th Cir. 1986) (instructional error on burden of proving affirmative defense of irresistible impulse not cognizable as due-process claim in federal habeas corpus); and *Clemmons* v. *Delo*, 177 F.3d 680 (8th Cir. 1999) (dicta) (distinguishing purported cognizability of claims of erroneous self-defense instruction from those based on complete absence of instruction) with *Baker* v. *Leapley*, 965 F.2d 657, 658 (8th Cir. 1992) (per curiam) (claimed error in burden-of-proof instructions on insanity not remediable in federal habeas corpus where state court found no state-law error). It therefore is true that some Circuits occasionally have endorsed a federal habeas corpus remedy for erroneous instructions on some affirmative defenses in state trials. But they have done so on vague and varying grounds and in any event without adequate explanation of how such relief might be squared with *Estelle* v. *McGuire* or with this Court's affirmative-defense jurisprudence.

Some courts assume that, where the state-law error was so significant that it determined the outcome of the case, the error therefore reaches the level of a "due process" violation rendering the trial unfair. See, e.g., *Davis* v. *Strack*, 270 F.3d 111 (2d Cir. 2001) (failure to instruct on state-law "justification" defense creates prejudice rising to level of due-process violation); *Barker* v. *Yukins*, 199 F.3d 867, 873 (6th Cir. 1999) (offering no explanation why error was unconstitutional,

but treating effect of error on outcome as sufficient "prejudice" warranting habeas corpus relief). Another court has simply inferred, from the constitutional right to present evidence negating the elements of charged offense, a right to instructions on an affirmative defense. *Tyson* v. *Trigg*, 50 F.3d 436 (7th Cir. 1995) (mistake defense in rape case) (dicta). It is hard, to say the least, to reconcile such seemingly circular reasoning with *Estelle* v. *McGuire's* conclusion that even prejudicial errors of State-law dimension cannot support habeas corpus relief under 28 U.S.C. § 2254, or to ignore the appellate courts' tendency in the cited cases to conflate the defendant's rights concerning proof of the elements of the crime with his interest in litigating affirmative defenses beyond those elements.[3/]

Review of the question presented in the case at bar is warranted in order ensure the vindication of this Court's *Estelle* v. *McGuire* rule, to resolve the conflict in the Circuits, and to properly account for the federalism concerns implicated in an expanding area in which federal courts employ dubious theories, bottomed in unusual ways on state-law claims, in service of federal-court review of final state-court judgments.[4/]

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3. Other courts have embraced still other problematic theories in this area. Compare *Taylor* v. *Withrow*, 288 F.3d 846 (finding a "fundamental right" to self defense), with *United States* v. *Russell*, 411 U.S. 423 (federal entrapment defense "is not of constitutional dimension"); and compare *Sloan* v. *Gramley*, 215 F.3d 1330 (7th Cir. 2000) (suggesting self-defense instructional error raises question of habeas corpus relief for actual innocence), with *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993) (no freestanding habeas corpus claims of innocence); *Townsend* v. *Sain*, 372 U.S. 293 (1963) (same). Cf. *Fetterly* v. *Paskett*, 997 F.2d 1295 (9th Cir. 1993) (habeas corpus relief lies for state-law errors if they deprived petitioner of a "liberty interest"); *Fetterly*, 15 F.3d 1472, 1475 (diss. op. on denial of rehearing); *Levine* v. *Torik*, 986 F.2d 1506, 1515 (6th Cir. 1993) (rejecting "liberty interest" theory).

4. As reflected in Judge Graber's dissent, see App. A18, the *Bradley* majority's treatment of 28 U.S.C. § 2254(d), the fundamental AEDPA reform ordinarily precluding relief for federal claims "adjudicated on the merits in State proceedings," repeats errors for which this Court already has reversed the Ninth Circuit in *Lockyer* v. *Andrade*, 123 S.Ct. 1166 (2003),

II.

Certiorari is warranted to review the Ninth Circuit's holding that a federal habeas corpus court may consider, in determining any prejudicial effect of an error occurring in the state trial, affidavits from trial jurors asserting how they would have voted if the error had not occurred.

This Court should grant certiorari, also, to decide whether federal habeas corpus courts may consider affidavits from jurors about the potential effect an unconstitutional error might have exerted on their deliberations. The Ninth Circuit's reliance on juror affidavits to undermine the state-court verdict in this case, App. A12-A13, departs widely from normal judicial procedure and from federal policies protecting both jurors from harassment and state criminal judgments from reversal based

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and *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam). The Warden, however, has concluded that certiorari review of the panel interpretations of the narrow exceptions to that reform is unavailable. For, it appears that–despite the assumption of the parties and the courts below—the state courts never adjudicated the merits of Bradley's purported federal constitutional claim. The California Court of Appeal, the focus of the panel's § 2254(d)(1) analysis in the opinion below, adjudicated on the merits only what Bradley presented to it: an unadorned state-law claim for entrapment instructions. See App. F. Although Bradley later presented the California Supreme Court with the new and improved claim he now presses in federal court—that the Constitution somehow guaranteed entrapment instructions if otherwise warranted under state law—the state supreme court merely denied discretionary review of that claim without reaching its merits.

Review on the equivalent *Teague* v. *Lane* "new rule" issue, see p. 11, *ante*, however, should not be deemed foreclosed. Cf. *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994); *Schiro* v. *Farley*, 510 U.S. 220, 228 (1994). In arguing before the Ninth Circuit, the state's representatives relied on *Gilmore* v. *Taylor*, *supra*, a case that extensively discussed *Teague's* application to a claim based on affirmative-defense instructions; the panel's adoption of a rule requiring affirmative-defense instructions as "clearly established federal law" in effect answered the *Teague* "new rule" question, see *Williams* v. *Taylor*, 529 U.S. at 412; and the Warden explicitly relied on the *Teague* doctrine in his rehearing petition.

upon new and debatable rules of law. Not surprisingly, then, it also conflicts with the holdings of other Circuits.

Here, in gauging whether the alleged entrapment-instruction error was harmless, the Ninth Circuit panel relied on affidavits from two jurors who claimed that they and the other jurors would have voted to acquit Bradley under entrapment instructions. This case thus presents, at the outset, a serious question of whether such hypothetical and after-the-fact affidavits are of sufficient reliability that they should be used to overturn State judgments. Use of such affidavits probably will have an especially pronounced impact in capital cases—where, even after state collateral proceedings, federal-court funding remains available to the petitioner, see PRICE WATERHOUSE COOPER, COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES (Feb. 1999), vi-viii, V40-43, V70-76, VIII-119 ($175,000 average for initial petition and evidentiary hearing), and where there has developed a culture of trying to enlist in the petitioner's cause jurors who over time might well be more likely than other jurors to have grown dissatisfied with their death-penalty vote.

At least equally important, reliance on such affidavits seems inconsistent with federal policies, reflected in Rule 606(b) of the Federal Rules of Evidence and in precedents of this Court such as *Tanner* v. *United States*, 403 U.S. 107 (1987), against embroiling jurors in continuing disputes about their service and their deliberations. Rule 606(b), indeed, specifically prohibits receiving juror affidavits on "the effect of anything upon that or any other juror's mind or emotion in influencing the juror to assent to or dissent from the verdict."

Moreover, in the related area of gauging prejudice caused by attorney incompetence at trial, this Court has endorsed objective consideration of the likely effect of the error on a reasonable decision-maker, as opposed to positing a unique or idiosyncratic decision-maker as the reference point. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). Consideration

of affidavits from individual jurors would seem inconsistent with the preference for objective harmless-error review. See *United States* v. *Cappas*, 29 F. 3d 1187, 1191 (7th Cir. 1994).

The panel's casual reliance on juror affidavits for harmless-error review of errors other than those pertaining to jury misconduct itself is novel in the federal habeas corpus system and perhaps in the federal system entirely. See *Murphy* v. *Tivoli Enterprises*, 953 F.2d 354 (8th Cir. 1992). Such use has been assumed to be impermissible. E.g., *Cappas*, 29 F.3d at 1192. Other Circuits have enforced, in habeas corpus proceedings, the general rule prohibiting use of juror affidavits, outside the context of inquiring into improper external influences on the jury, to undermine state-court judgments. E.g., *Fulwood* v. *Lee*, 290 F.3d 663, 684 (4th Cir. 2002); *Silagy* v. *Peters*, 905 F. 2d 1086, 1008-1009 (7th Cir. 1990); see Fed. R. Evid. 1101(b).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Dated: August 12, 2003

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY BRADLEY, *Petitioner-Appellee,* v. W. A. DUNCAN, Warden, *Respondent-Appellant.*	No. 01-55290 D.C. No. CV-00-00527-VAP OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
February 14, 2002—Pasadena, California

Filed December 24, 2002

Before: Warren J. Ferguson, A. Wallace Tashima, and
Susan P. Graber, Circuit Judges.

Opinion by Judge Ferguson;
Dissent by Judge Graber

COUNSEL

Jeffrey S. Kross, Oakland, California, for the petitioner-appellee.

J. Michael Lehmann (argued), Corey J. Robins, Office of the Attorney General of the State of California, Los Angeles, California, for the respondent-appellant.

OPINION

FERGUSON, Circuit Judge:

Warden William A. Duncan ("the State") appeals the District Court's conditional grant of Defendant/Petitioner Gary Bradley's ("Bradley") 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his conviction on the grounds that the state trial court's refusal to instruct the jury on the defense of entrapment violated his federal due process rights. The District Court adopted the recommendations of the Magistrate Judge, who found that the refusal to instruct effected prejudicial constitutional error, and that the California appellate court's denial of his claim was contrary to and involved an objectively unreasonable application of controlling federal law. We affirm the District Court's conditional grant of habeas relief.

Defendant/Appellee Gary Bradley ("Bradley") was arrested and charged with one count of selling cocaine in violation of California Health and Safety Code section 11352(a). Bradley's only defense at trial was that he was entrapped by the police into committing the offense.

At the conclusion of trial, the state trial court instructed the jury on the defense of entrapment pursuant to the defense's request. The instructions are set forth in the appendix to this

opinion. During deliberation, the jury requested two clarifications regarding the entrapment instructions. After three days of deliberations, the jury still could not reach a verdict as to Bradley's guilt, and a mistrial was declared.

Bradley was retried before another state court judge. During the second trial, Bradley's testimony from the first trial was read into evidence during the prosecution's case-in-chief. Bradley had admitted that he facilitated the sale of cocaine, but testified that his sole purpose was to help an unwitting police agent, Jose de Jesus Flores, who was suffering greatly due to drug withdrawal. At the close of evidence, the defense again requested an entrapment instruction. This time, the trial court denied the request without explanation.

Not surprisingly, the jury found Bradley guilty. He was sentenced to twenty-five years to life imprisonment pursuant to California's "three strikes" provisions. CAL. PEN. CODE §§ 667(b)-(i), 1170.12(a)-(d).[1/]

The state claims that Bradley did not present sufficient evidence to deserve an instruction on entrapment. Its reasoning is simply fallacious. The evidence presented at the first trial warranted an instruction. The same evidence was adduced at the second trial. Yet, Bradley was deprived of an instruction on entrapment at his second trial.

To demonstrate why the District Court was correct in granting habeas corpus relief, we review the facts underlying Bradley's arrest. Next, we analyze these facts in light of the governing state law and find that Bradley was entitled to an entrapment instruction. Third, we determine that the failure to instruct on Bradley's only defense violated his due process right to present a full defense. Finally, we conclude that Bradley is entitled to habeas relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

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1. The prior convictions were for a 1980 and a 1988 burglary.

A. Factual Background

On January 8, 1996, while conducting an undercover narcotics operation, Officers Servando Pena and Melissa Town observed Jose de Jesus Flores standing on the sidewalk. Officer Pena pulled the unmarked car over and motioned for Flores to approach the car. Flores came over to the car, smelling of alcohol. Officer Pena asked Flores if he could "hook" him up with twenty dollars worth of cocaine. Flores stated that he did not have any, but he would take the officers to obtain drugs. Flores got into the car and directed Officer Pena to drive toward a particular intersection, but he did not state that he was looking for any specific person.

Officer Pena knew something was wrong with Flores and believed that he was going through drug withdrawal. Flores was pale and shaking, his head kept moving back and forth, and he said he desperately needed cocaine. As they approached the intersection, Flores spotted Bradley, whom he had previously seen in passing, and called out for him to stop. Flores told Officer Pena to pull over, exited the vehicle, and vomited audibly in front of the officers and Bradley. Moments later, he approached Bradley.

Bradley observed that Flores was going through withdrawals—he looked "pinkish, yellowish, sick"; he smelled like vomit; he was "tweaking and twitching"; and he was "shaking, like . . . a junky dude." Flores implored him to help him "get something." Bradley asked him what he meant, and Flores responded "I'm hurting. I need a fix." Flores begged Bradley for drugs, asking repeatedly "Can you help me?" Flores told Bradley he was ill and appealed to him saying, "Please, please, big man, would you help me out?"

Bradley finally agreed but told Flores to wait, stating: "I have to go see because I don't, you know, do it. I know people up and down the street that does it, but I don't do it." Bradley then rode his bicycle up the street where drug dealers congregated. The officers and Flores followed him in the vehicle. When they reached the designated intersection, Flo-

res gave Bradley the officers' twenty-dollar bill. However, Bradley did not locate anyone selling drugs and returned the money.

Bradley then proceeded homeward on his bicycle, but he stopped upon observing co-defendant Tyrone Jennings walking towards a liquor store. Bradley caught up with Flores and the officers and told them to meet him at the liquor store. Bradley obtained twenty dollars from the officers, exchanged it for cocaine from Jennings, and delivered the cocaine to the officers and Flores. Bradley was arrested minutes later. No drugs were found on his person.

B. Entrapment under California Law

The purpose of the entrapment defense is to deter impermissible police conduct. *People v. Barraza*, 591 P.2d 947, 956 n.5 (Cal. 1979); *People v. Holloway*, 55 Cal. Rptr. 2d 547, 551 (Ct. App. 1996), *overruled on other grounds by People v. Fuhrman*, 941 P.2d 1189, 1199 n.11 (Cal. 1997). In adopting an objective test of entrapment, the California Supreme Court reasoned, "the function of law enforcement manifestly 'does not include the manufacturing of crime.' " *Barraza*, 591 P.2d at 954 (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)).

[1] It is permissible for the police to offer "the simple opportunity to act unlawfully," by the use of decoys or otherwise. *Id.* at 955. However, "it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." *Id.* It is also impermissible for the police or their agents to conduct themselves in a manner that would induce a normally law-abiding person "to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose." *Id.*

[2] Entrapment is a jury question because of "its potentially substantial effect on the issue of guilt." *Id.* at 956 n.6; *see also People v. Lee*, 268 Cal. Rptr. 595, 598 (Ct. App. 1990) ("Entrapment is ordinarily a fact question.") (citations omitted). The defendant is entitled to an entrapment instruction if he presents sufficient evidence for a reasonable jury to conclude that he was entrapped. *See People v. Watson*, 990 P.2d 1031, 1032 (Cal. 2000) (citing substantial evidence standard from *People v. Flannel*, 603 P.2d 1, 10 (Cal. 1979). "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." *Flannel*, 603 P.2d at 10 (internal quotation marks and citation omitted).

In this case, the California Court of Appeal found that Bradley was not entitled to an entrapment instruction under California law. However, its decision involved "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). Moreover, it failed to view the evidence in the light most favorable to Bradley.

First, the California Court of Appeal's decision was unreasonable in light of the record. The court characterized the police conduct as "an ordinary, run-of-the-mill, undercover drug operation in which a decoy was used." In so doing, it stated that "[n]either officer badgered, cajoled, nor did any other affirmative act likely to induce a normally law-abiding person to commit the crime."

[3] Although the California Court of Appeal was correct that neither Officer Pena nor Officer Town badgered, cajoled, or importuned Bradley personally, their decoy did. The court overlooked Flores' actions in determining that the facts did not support an entrapment instruction. Yet, a decoy who is manipulated by the police also constitutes a police agent "for purposes of the entrapment defense, even [if] the third party remains unaware of the law enforcement object." *People v. McIntire*, 591 P.2d 527, 530 (Cal. 1979).

[4] Flores, the unwitting police agent, targeted Bradley individually and begged him for drugs. Flores' appeal, "Please, please, big man, would you help me out?"—despite

Bradley's statements that he neither had drugs nor sold them —could certainly be found by a jury to constitute "badgering" or "cajoling." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 161 (1966) (defining "badger" as to "pester . . . in a manner likely to confuse, annoy, or wear down"); *id.* at 313 (defining "cajole" as "to persuade with deliberate flattery esp[ecially] in the face of reasonable objection or reluctance"). In light of the urgency of Flores' requests, his conduct also constitute d "importuning" in the ordinary meaning of the term. *Id.* at 1135 (defining "importune" as "to press or urge with . . . unreasonable requests").

Moreover, the California Court of Appeal's determination that the police merely offered the opportunity to act illegally was unreasonable in light of the record. Officers Pena and Town chose as their "hook" a drug addict who was going through withdrawals and was very ill. This was not a case in which the police merely used an underage decoy to purchase alcohol, *see Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.*, 869 P.2d 1163 (Cal. 1994), or to respond to an ad soliciting sex with a female of any age. *See People v. Reed*, 61 Cal. Rptr. 2d 658 (Ct. App. 1996). This was a case in which the police used a decoy whose physical suffering would appeal to the sympathies of most people.

[5] Second, the California Court of Appeal failed to resolve its doubts as to whether a normally-law-abiding person would have been induced to commit the crime out of sympathy for Flores in favor of Bradley. *See Flannel*, 603 P.2d at 10. The court denied Bradley's claim, reasoning that "the average person would not . . . purchase illegal drugs to aid a stranger, even if the stranger appeared to be a drug addict going through withdrawal."[2/] What a normally-law-abiding person

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2. The California Court of Appeal's statement that Flores was a "stranger" is also unreasonable in light of the record. At the very least, Flores was an acquaintance. The record reflects that Bradley had seen Flores in passing. Moreover, Officer Town testified at trial that Bradley assured the officers that he would not 'rip them off' because Flores knew where to find

would do under the circumstances should have been left to the jury. A reasonable jury could find that a normally-law-abiding person would feel sympathy for Flores in his desperate state and decide to help him obtain drugs to relieve his suffering.

The Court of Appeal compounded its error by speculating that a normally-law-abiding person confronted by an evidently ill drug-addicted stranger in the throes of withdrawal would not purchase drugs for Flores, but would opt for a legal alternative. Of course, calling the police is an alternative to acquiescing in illegal activity, and it is conceded that taking a drug addict to a clinic is preferable to enabling his drug addiction. But one could always speculate about a legal alternative to the illegal action ultimately taken.[3/]

A normally-law-abiding person does not always take the high road in the face of pressures or inducements by the police or their agents. As Justice Frankfurter observed in *Sherman*: "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." 356 U.S. at 384 (Frankfurter, J., concurring). The state ignores the purpose of the entrapment defense, which is to curb unsavory police conduct. Instead of focusing on the impermissible police conduct, the state chooses to blame Bradley and to point out what he should have done differently. This argument is circuitous and leaves no situation where the defendant can assert entrapment as a defense.

Moreover, in faulting Bradley for failing to call the police or take Flores to a treatment center, the state turns a blind eye to the fact that the officers did not do so either. Not only did the officers in this case fail to help Flores, they isolated him

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him. Thus, Flores was not a stranger to Bradley.

3. Further, the state's reliance on *People v. Graves*, 113 Cal. Rptr. 2d 708 (Ct. App. 2001), for the proposition that Bradley should have chosen a "lawful alternative," is misplaced. In that case, the defendant responded illegally to a legal request. *Id.* at 713. Here, Bradley acquiesced in an illegal request.

from any potential assistance, using him as a decoy and then arresting him as a co-defendant in this case. If anyone in this case had a duty to assist Flores, it was the officers, not Bradley. This is especially true because Bradley was on a bicycle (and could not transport Flores anywhere), whereas the officers were in a vehicle and had control over Flores as a passenger. However, instead of taking him to get help, the officers decided to exploit Flores' addiction as a tool to induce another person's participation in a drug sale. Under *Barraza* and its progeny, this is impermissible.

[6] It is important to remember that at Bradley's first trial, the trial judge found that the evidence presented required that the jury be given an entrapment instruction. The evidence presented at the second trial was *exactly* the same as the first trial, yet the second trial judge refused to give the instruction. As the District Court below observed:

> By refusing to instruct the jury on entrapment, the trial judge essentially left the jury with petitioner's confession to the offense, without ever allowing them to consider petitioner's preclusive defense. By rejecting petitioner's request for an entrapment instruction, the trial court effectively deprived petitioner of his only defense. (ER 77)

This kind of manipulation of the jury is simply not permissible. "The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977).

[7] Moreover, when one judge determines, as a matter of law and fact, that the evidence requires the giving of an entrapment instruction, and no additional evidence to the contrary is proffered at a subsequent trial, the second judge may not simply ignore the findings of the first. "It is a fundamental principle of jurisprudence . . . that a question of fact or of law distinctly put in issue and directly determined by a [criminal

or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties." *Frank v. Magnum*, 237 U.S. 309, 334 (1915) (internal citation omitted). California recognizes this application of the law of the case doctrine. The California Court of Appeal recently held that a superior court judge lacked the authority to vacate and redetermine the bail setting determination of another superior court judge. *In re Alberto*, No. B158722, slip. op. 11205 (Ct. App. September 25, 2002). The decision reasoned that "for one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." *Id.* at 11206. *See also, People v. Woodard*, 131 Cal.App.3d 107, 111 (Ct. App. 1982). In the instant case, the second judge simply ignored the findings of the previous judge, without even bothering to assert that the earlier decision was erroneous or that the circumstances of the case had changed. This kind of unauthorized second-guessing is impermissibly arbitrary and can amount to a violation of Due Process.

C. Due Process Violation

The failure to instruct the jury on Bradley's defense theory of entrapment was not simply a state law error. It also effected a violation of Bradley's due process rights.

[8] The Supreme Court has held that "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citation omitted). We have applied this standard to habeas petitions arising from state convictions. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.").

The failure to instruct the jury on entrapment deprived Bradley of his due process right to present a full defense. The Supreme Court has held: "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a *meaningful* opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (emphasis added).

[9] Thus, the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. *See Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir. 1999) (granting habeas relief under AEDPA because the erroneous self-defense instruction deprived the defendant's of a "meaningful opportunity to present a complete defense") (relying on *Trombetta*, 467 U.S. at 485), *cert. denied*, 530 U.S. 1229 (2000). This is so because the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1997).

In this case, the refusal to instruct on entrapment deprived Bradley of his only defense and, as a result, of due process. Bradley testified at his first trial that he bought the cocaine for Flores and explained that he did so out of concern for Flores' well-being and sympathy for his plight. At the second trial, the prosecution read Bradley's testimony into the evidence.

During closing argument, the prosecutor pointed to the portion of the record in which Bradley had confessed to the crime. He admonished the jury not to consider the evidence that Bradley had acted as a "Good Samaritan" or that he had committed the crime out of sympathy for Flores. He also reminded the jury of the court's instruction not to acquit on the basis of "sympathy" for Bradley. Defense counsel argued that the officers' "tactics" of manipulating a drug addict going through withdrawals was "despicable" and is not "something that should be done." However, because of the court's refusal

to instruct on entrapment, he could not point to a legal grounds on which the jury could acquit Bradley if it agreed.[4/]

[10] Under these circumstances, the failure to instruct on entrapment prevented Bradley from presenting his full defense. Accordingly, due process was violated. Nevertheless, because the failure to instruct on entrapment was a trial error, Bradley is entitled to relief only if he can show prejudice. *Cal. v. Roy*, 519 U.S. 2, 5 (1996) (explaining harmless-error analysis).

[11] Prejudice is shown for purposes of habeas relief if the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 6 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Moreover, we must grant the petition if we are " 'in grave doubt as to the harmlessness of an error.' " *Id.* (quoting *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995)).

[12] As aforementioned, Bradley presented ample evidence supporting the giving of the entrapment instruction. Moreover, we need only look at the differing results of the two trials to find that the failure to so instruct had a substantial and injurious effect on the jury verdict. In the first trial, an instruction was given, and a mistrial was declared after three days of deliberation and two clarifications on the defense. In the second trial, the same evidence was presented, but the instruction was not given. A guilty verdict was the result. In addition, in his appeal to the California Court of Appeals, Bradley filed declarations from two jurors on the second jury, both of whom stated that "the jury verdict (or the jury's ability to

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4. Use of Bradley's testimony from the first trial, in which an entrapment instruction was given, against him in the second trial, in which no entrapment instruction was given, presents an additional element of unfairness. Presumably, Bradley elected to testify at the first trial to support his entrapment defense. If he knew that no entrapment instruction would be given, he may well have elected to stand on his Fifth Amendment right not to testify. Thus, the refusal to give an entrapment instruction at the second trial, in effect, sandbagged Bradley into testifying and virtually confessing guilt, even though no entrapment instruction was given.

reach a unanimous verdict) would have been different if these [entrapment] instructions had been given."

[13] Under these circumstances, the failure of the trial court to instruct the jury as to Bradley's entrapment defense, causes at least a "grave doubt as to the harmlessness of the error." *O'Neal*, 513 U.S. at 437. Thus, Bradley has sufficiently shown prejudice and is entitled to relief on his due process claim.

D. Habeas Relief under AEDPA

Having concluded that Bradley's due process rights were violated, we turn to the issue whether he has fulfilled the requirements of AEDPA. As previously discussed, the California Court of Appeal's decision that Bradley was not entitled to an entrapment instruction involved an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). However, it is the due process violation, not the state law error, that triggers our habeas relief.

Because the California Court of Appeal did not address Bradley's due process claim, we must conduct an independent review of the record to determine "whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Thomas v. Hubbard*, 273 F.3d 1164, 1170 (9th Cir. 2001) (as amended) (quoting *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)).

We have held that a state court decision must be reversed as involving an "unreasonable application" of clearly established federal law when we have a "firm conviction" that the state court erred. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000) (adopting a "clear error" standard for habeas review under AEDPA), *cert. denied*, 531 U.S. 944 (2000). Contrary to the dissent's suggestion, we accept the principles mandated by the Supreme Court in *Woodford v. Vicciotti*, No. 02-137, 2002 WL 31444314 (U.S. Nov. 4, 2002) (per curiam) and *Early v. Packer*, No. 01-1765, 2002 WL 31444316 (U.S. Nov. 4, 2002) (per curiam), requiring

that the state court decision reflect an "objectively unreasonable" application of federal law. However, the record is clear that the California Court of Appeal's decision *was* an "objectively unreasonably" application of federal law. The Court of Appeal failed to recognize Bradley's right to present a complete and meaningful defense to the jury under the principles set out in *Matthews* and *Trombetta*. It failed to consider the facts relevant to the due process prejudice prong, including the undisputed evidence that jurors in the second trial would not have convicted the defendant if the entrapment instruction had been given. It failed to explain why the second judge could unilaterally ignore the first trial judge's findings of fact and conclusion of law regarding the entrapment instructions and not compose even a single sentence to explain away the law of the case doctrine. It is clear that the California Court of Appeal's failure to address these issues constituted an objectively unreasonable determination of both the law and the facts.

The dissent would dismiss Bradley's habeas petition on the basis that he "has cited no United States Supreme Court case . . . that would require the giving of an entrapment instruction in a state-criminal trial when there is insufficient evidence to support such an instruction under state law." Dissent at 27 (citing *Bueno v. Hallahan*, 988 F.2d 86, 88 (9th Cir. 1993)). However, no such case need be cited here. As shown above, Bradley more than sufficiently supported his defense theory of entrapment, and the fact that the entrapment instruction was given in his first trial is further proof of this.

The dissent misconstrues the nature of our inquiry under AEDPA. Bradley need not produce a "spotted calf" on the precise issue at hand to warrant habeas relief. *See Van Tran*, 212 F.3d at 1154 & n.16 ("AEDPA does not require an on-point Supreme Court case for us to reverse . . . ."). Rather, it is sufficient that the due process violation involved here offends the principles previously enunciated by Supreme Court precedent and reaffirmed by our case law. *See id.*; *see also Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002)

("The [Supreme] Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent.") (citing *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

The District Court was correct to grant habeas relief. Affirmed.

Appendix

CALJIC No. 4.60 provides:

It is a defense to a criminal charge that the commission of the alleged criminal act, was induced by the conduct of law enforcement agents or officers [or persons acting under their direction, suggestion or control] when the conduct would likely induce a normally law-abiding person to commit the crime. [¶] To establish this defense the defendant has the burden of proving by a preponderance of the evidence that the conduct of the law enforcement agents or officers [or persons acting under their direction, suggestion, or control] would likely induce a normally law-abiding person to commit the crime.

CALJIC No. 4.61 provides:

In deciding whether this defense has been established, guidance will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the criminal other than ordinary criminal intent, entrapment will be established. An example of this type of conduct would be an appeal by the police that would induce a normally law-abiding person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law abiding person will likewise constitute entrapment. This conduct would include, for example, a guarantee that the act is not illegal or the crime will go undetected, an offer of exorbitant consideration, or any similar enticement. [¶] Finally, while the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this pur-

pose, for example, are the transactions preceding the crime, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission. [¶] [Matters such as the character of the defendant, [his], [her] predisposition to commit the crime, and [his] [her] subjective intent are not relevant to the determination of the question of whether entrapment occurred.]

CALJIC No. 4.61.5 provides:

It is permissible for law enforcement agents or officers [or persons acting under their direction, suggestion or control] to provide opportunity for the commission of a crime including reasonable, though restrained, steps to gain the confidence of suspects. It is not permissible for law enforcement agents or officers [or persons acting under their direction, suggestion or control] to induce the commission of a crime by overbearing conduct such as badgering, coaxing or cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

GRABER, Circuit Judge, dissenting:

I respectfully dissent. The majority fails to adhere to our standard of review. The California courts made no factual error and no error of California law. Federal law does not, independently, require an entrapment instruction in a state court criminal trial when there is insufficient evidence to support it as a matter of state law. Accordingly, I would reverse the district court's conditional grant of habeas relief to Petitioner.

The Supreme Court of the United States has just chastised this court, in the strongest possible terms, for substituting our judgment for that of a state court on matters of federal law, including legal issues that involve an interpretation and application of facts. *Woodford v. Visciotti*, 123 S. Ct. 357 (2002) (per curiam); *Early v. Packer*, 123 S. Ct. 362 (2002) (per curiam). We have even less justification for substituting our judgment for that of a state court on matters of its own state law. Indeed, we wholly lack authority to second-guess a state court on a question of state law. Yet that is precisely what the majority does here, in clear contravention of both AEDPA and the Supreme Court's interpretation of it.

Petitioner was convicted in state court on one count of selling cocaine in violation of California Health & Safety Code § 11352(a). At trial, he argued that he had been entrapped by the police officers' use of a decoy who was obviously suffering symptoms of withdrawal from drugs. Petitioner contended that the decoy's plight induced him to commit a crime that he would not otherwise have committed. He requested an entrapment instruction, which the state trial court refused to give. On appeal, the California Court of Appeal held that the trial court properly declined to instruct the jury on entrapment because Petitioner had not presented substantial evidence in support of that theory:

> Here, there was no substantial evidence to support entrapment instructions. This was an ordinary, run-of-the-mill, undercover drug operation in which a decoy was used. The officers used Flores as a "hook" in locating a source for cocaine; [Petitioner] expressed his willingness to assist in finding cocaine, and [Petitioner] took actions toward accomplishing that goal. He located a source for the drugs and exchanged money for the drugs. The police did not conduct themselves improperly. Neither officer badgered, cajoled, nor did any other affirmative act likely to induce a normally law-abiding person to commit the crime. [Petitioner] was simply offered the opportunity to commit the crime.
>
> . . . .
>
> . . . [T]he average person would not, as [Petitioner] contends, purchase illegal drugs to aid a stranger, even if the stranger appeared to be a drug addict going through withdrawal. . . . (*Cf. People v. Lee* (1990) 219 Cal. App. 3d 829 [sailor working with police befriends drug dealer to assist in gaining dealer's confidence; such casual, brief, non-intimate acquaintances does not constitute entrapment]; compare with *People v. McIntire* [(1979)] 23 Cal. 3d 742 [facts sufficient to raise entrapment defense when defendant acquiesces to strong and persistent pressure applied by police through defendant's younger brother based upon sympathy aroused by family problems].)

People v. Bradley, No. B112640 (Cal. Ct. App. filed Nov. 17, 1998) (footnotes omitted). The California Supreme Court denied review in an unpublished decision.

Petitioner then initiated this federal habeas action. The district court held that the California courts erred as a matter of California law when they concluded that Petitioner had failed to present sufficient evidence to be entitled to a jury instruc-

tion on entrapment. Because Petitioner had been entitled to the instruction under state law, the court concluded, the state court's failure to give the instruction violated Petitioner's due process rights. The majority agrees and, by doing so, essentially reviews de novo questions of state law.

We may grant habeas relief under 28 U.S.C. § 2254(d) only if the decision of the California Court of Appeal (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In reviewing the petition, we are "bound by the state court's interpretations of state law," and we must presume the correctness of the state court's factual findings in the absence of "clear and convincing evidence" to the contrary. *Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000); 28 U.S.C. § 2254(e)(1). Additionally, the standard for finding an unreasonable application of federal law is a high one. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). The majority's opinion neither presumes the correctness of the state court's factual findings nor holds itself bound by the state court's interpretation of state law.

Here we are reviewing the California Court of Appeal's holding that, *as a matter of California law*, Petitioner failed to present sufficient evidence to be entitled to an instruction on entrapment. Therefore, we are bound by that holding unless it involves "an unreasonable determination of the facts in light of the evidence presented" or is contrary to federal law. 28 U.S.C. § 2254(d). "A state court has the last word on the interpretation of state law." *Mendez v. Small*, 298 F.3d 1154, 1158 (9th Cir. 2002).

The majority's contention that the California Court of Appeal's determination was "an unreasonable determination of the facts in light of the evidence presented" is flawed. The majority identifies two "factual" conclusions made by the California Court of Appeal that the majority finds unreasonable: (1) the Court of Appeal determined that "[n]either officer badgered, cajoled, nor did any other affirmative act likely to induce a normally law-abiding person to commit the crime," maj. op. at 10; and (2) the "Court of Appeal failed to resolve its doubts as to whether a normally law-abiding person would have been induced to commit the crime out of sympathy for Flores in favor of [Petitioner]," maj. op. at 11. Neither of those claimed errors is sufficient to merit relief under our standard of review, as the majority apparently realizes when it states that "it is the due process violation, not the state law error, that triggers our habeas relief." Maj. op. at 17.

Under California law, as the majority concedes, maj. op. at 9-10, a defendant must present substantial evidence of entrapment to be entitled to a jury instruction on the defense. *People v. Watson*, 990 P.2d 1031, 1032 (Cal. 2000). Substantial evidence is "evidence enough to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded" that the defendant was entrapped. *People v. Flannel*, 603 P.2d 1, 10 (Cal. 1980) (citation and internal quotation marks omitted).

"In California, the test for entrapment focuses on the police conduct and is *objective*." *Watson*, 990 P.2d at 1032 (emphasis added); *see also People v. Barraza*, 591 P.2d 947, 954-55 (Cal. 1979).[1/] To be entitled to an instruction on entrapment, a defendant must present substantial evidence that "the conduct of the law enforcement agent [was] likely to induce a

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1. Notably, one of Petitioner's requested instructions, CALJIC 4.61, is entitled "Entrapment—Objective Test—Guidance" and cautions, among other things, that such matters as the defendant's "subjective intent are not relevant to the determination of the question of whether entrapment occurred."

normally law-abiding person to commit the offense." *Id.* at 955. The law "*presume[s] that such a person would normally resist the temptation to commit a crime* presented by the simple opportunity to act unlawfully." *Id.* (emphasis added). The question is whether "the police or their agents . . . pressure[d] the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." *Id.* "[T]he rule is clear that ruses, stings, and decoys are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place *to an extent and degree* that is likely to induce an otherwise law-abiding person to commit a crime." *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.*, 869 P.2d 1163, 1167 (Cal. 1994) (emphasis added) (citation and internal quotations omitted). An appeal to a defendant's sympathy by police can result in entrapment but only if that appeal would cause the "normally law-abiding person" to turn to crime. *Barraza*, 591 P.2d at 955. Whether the police conduct at issue constitutes entrapment is "judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand." *Id.*

Viewed in the light most favorable to Petitioner, the evidence shows that he was approached by a police decoy who was demonstrating overt signs of drug withdrawal. The decoy vomited just before approaching Petitioner, smelled like vomit, appeared "pinkish, yellowish, sick," and was "tweaking and twitching." The decoy asked Petitioner to "get something" and to help him get a fix because he was hurting. He repeatedly told Petitioner that he was really ill and needed drugs. Petitioner had seen the decoy before, but did not know

him.[2/] Nevertheless, Petitioner decided to purchase drugs and provide them to the decoy.

It is clear that the decoy's withdrawal symptoms appealed to Petitioner's sympathy and, I expect, would appeal to the sympathy of nearly every normally law-abiding person. However, that fact, standing alone, is insufficient to permit an entrapment defense under California law. Instead, the appeal to sympathy must have been to an extent and degree that were likely to cause a normally law-abiding person to buy or sell drugs. As the California Court of Appeal permissibly and reasonably concluded, a normally law-abiding person confronted by an ill, drug-addicted stranger (or casual acquaintance) in the throes of withdrawal—like the decoy in this case—would not respond by providing illegal drugs to him. That conclusion is particularly reasonable in view of the fact that there are several obvious lawful alternatives available to help a manifestly ill person, such as calling 911 or taking the person to a clinic. *Cf. People v. Graves*, 113 Cal. Rptr. 2d 708, 712-13 (Ct. App. 2001) (holding that entrapment did not apply in part because lawful responses were available to a request for help made at the behest of law enforcement, reasoning that a "normally law-abiding person" would opt for the lawful response).

In short, the California courts reasonably concluded that Petitioner had not presented enough evidence to support the giving of state-law entrapment instructions, because the facts, even when viewed in favor of Petitioner, did not show government conduct likely to induce a normally law-abiding person to break the law by selling cocaine. Even if we disagree with the California courts, we are obliged to give effect to their reasonable determination. *Packer*, 123 S. Ct. at 366.

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2. The majority quarrels with the state court's reference to Flores as a "stranger." Maj. op. at 11 n.2. The California Court of Appeal's distinction between "casual, brief, non-intimate acquaintances" on the one hand and "family" ties on the other shows that the court understood, as the majority puts it, that Petitioner and Flores were "acquaintance[s]" who had at least seen each other "in passing." *Id.* The state court made no factual error in this respect.

The majority explicitly rests its holding on the conclusion that Petitioner's due process rights were violated by the California courts' refusal to provide an entrapment instruction. Maj. op. at 17. It appears that the majority finds two distinct due process violations: (1) Petitioner was entitled to an entrapment defense as a matter of constitutional law even though he was *not* entitled to it under state law; and (2) the judge in the second trial was not permitted to give different jury instructions than the judge in the first trial, which ended in a mistrial. The majority fails to cite any persuasive authority for the proposition that Petitioner was denied due process.

Petitioner has cited no United States Supreme Court case, and I am aware of none, that would require the giving of an entrapment instruction in a state-court criminal trial when there is insufficient evidence to support such an instruction under state law. *Cf. Bueno v. Hallahan*, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam) (holding that a federal criminal defendant's entitlement to an entrapment instruction is not constitutionally based and that Arizona, consistent with due process, could require that a state defendant "admit all of the elements of each offense" as a prerequisite to receiving a jury instruction on entrapment); *see also United States v. Russell*, 411 U.S. 423, 433 (1973) (stating that the entrapment defense itself "is not of a constitutional dimension"). Indeed, the majority recognizes that a due process violation occurs from the failure to instruct as to a recognized defense only in the event that " 'there exists evidence sufficient for a reasonable jury to find' " in accordance with the proffered defense. Maj. op. at 14 (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

The majority recites the proposition that "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense." Maj. op. at 15. Relying on that principle, the majority states that the California courts' refusal to give an entrapment instruction denied Petitioner due process because it deprived him of his "only defense." Maj. op. at 15. But a

defendant does not have a right to present whatever defense he or she desires, whether or not supported by the law, and a state court may refuse to give an instruction to which a defendant is not entitled even if it is the only theory that the defendant wishes to advance. The California courts conclusively held that Petitioner was not entitled to the entrapment instruction under California law, so the failure to give an instruction was not arbitrary. The question, therefore, is whether Petitioner was entitled to an entrapment instruction as a matter of federal constitutional law.

The majority cites no meaningful authority that it is "clearly established federal law" that a defendant in Petitioner's circumstance is entitled to a defense of entrapment. Much is made of the fact that a defendant is entitled to a "complete defense." Maj. op. at 14. Although that statement is accurate, it is entirely unhelpful to the present inquiry. We have authority to answer only a very narrow question: Did the California courts' refusal to give the entrapment instruction deprive Petitioner of due process? All of the cases cited by the majority simply beg the question: It is undisputed that Petitioner had a right to a complete defense and that California could not *arbitrarily* deprive him of his chosen defense. The only matter of moment is whether an *entrapment instruction* was a part of a defense to which Petitioner was constitutionally entitled.

The majority dismisses the need for a precedent stating that a defendant presented with the opportunity to commit a crime by a drug-affected decoy is per se entitled to an entrapment instruction as a matter of federal constitutional law, regardless of the state law of entrapment. Such a "spotted calf" is not needed, the majority holds, because "[Petitioner] more than sufficiently supported his defense theory of entrapment." Maj. op. at 18. The foregoing assertion is incorrect as a matter of law.

We *know* that Petitioner did not "sufficiently support[ ]" his theory of entrapment as a matter of *California* law. We know this because the California Court of Appeal has spoken

directly to the issue, and the California Supreme Court did not disturb its holding.

If the majority is stating, instead, that Petitioner "sufficiently supported" his defense theory as a matter of *federal* law, "as determined by the Supreme Court of the United States," then it is necessary to find a Supreme Court precedent that "clearly establishe[s]" that defendants who satisfy a certain evidentiary threshold in a state criminal case governed by state law are constitutionally entitled to an entrapment instruction. As the majority concedes, no such case exists.

What those in the majority seem to be saying is that *they* consider the evidence sufficient to support an entrapment instruction. This kind of federal oversight of state-court proceedings is precisely what the Supreme Court in *Visciotti* and *Packer* has told us not to perform.

The majority also errs when it reasons that the giving of an entrapment instruction in the first trial shows that Petitioner was entitled to such an instruction under California law, maj. op. at 13, or required the California Court of Appeal to explain "why the second judge could unilaterally ignore the first trial judge's findings of fact and conclusions of law regarding the entrapment instructions," maj. op. at 18. The California Court of Appeal held that, on the evidence presented, Petitioner was not entitled to an entrapment instruction under California law. By clear implication, this means that, as a matter of California law, the *first* trial judge erred. Petitioner is not constitutionally entitled to perpetuate an erroneous instruction in his favor.

Equally unpersuasive is the majority's assertion that the judge's decision not to give the entrapment instruction in the second trial was a "kind of unauthorized second-guessing [that] is impermissibly arbitrary and can amount to a violation of Due Process." Maj. op. at 14. The majority cites the California Court of Appeal's recent decision in *In re Alberto*, 125 Cal. Rptr. 2d 526, 530 (Ct. App. 2002), maj. op. at 13-14, for the proposition that "for one superior court judge, no matter how well intended, even if correct as a matter of law, to nul-

lify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." (Internal quotation marks omitted.) The majority fails to observe a crucial distinction between the present case and *Alberto*. In *Alberto*, one trial judge overruled a coequal trial judge's in-force bail determination in the same case. 125 Cal. Rptr. 2d at 530. In this case, Petitioner's first trial ended in a *mistrial*. The judge in a second trial is not compelled to follow determinations of fact or law established by the judge in an earlier proceeding that ended in a mistrial. To hold otherwise would undermine a basic tenet of California law. *See Mouser v. Superior Court*, 186 Cal. Rptr. 21, 23 (Ct. App. 1982) (" 'The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the *former verdict* or finding *cannot* be used or referred to, either in evidence or in argument . . . .' Thus, the granting of a new trial has the same effect as a mistrial." (quoting Cal. Penal Code § 1180)); *Veitch v. Superior Court of the County of Santa Clara*, 152 Cal. Rptr. 822, 825 (Ct. App. 1979) (same).

The fact that defense counsel allowed Petitioner's statement from the first trial to be read into the record of the second trial without first having secured the judge's ruling regarding an entrapment instruction may well constitute ineffective assistance of counsel. However, Petitioner makes no claim of ineffective assistance of counsel. We are not at liberty to distort his other claims so as to recognize this possibility.

In summary, the majority has failed to defer to the factual findings and state-law interpretation of the California courts, as we are required to do. When the correct standard of review is applied, reversal with instructions to deny the petition is required. I therefore dissent from the majority's decision to affirm.

APPENDIX B

FILED
SEP 14 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY BRADLEY,	) No. EDCV 00-527
	) VAP (AIJ)
Petitioner,	)
	) **REPORT AND**
v.	) **RECOMMENDATION**
	) **OF UNITED STATES**
WILLIAM DUNCAN, Warden,	) **MAGISTRATE JUDGE**
	)
Respondent.	)
	)

This Report and Recommendation is submitted to the Honorable District Judge Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEDURAL HISTORY

A jury convicted petitioner of one count of selling, furnishing, or giving away cocaine. (Clerk's Transcript ("C.T.") 182). The court sentenced petitioner to twenty-five years to life in state prison, pursuant to California's "three strikes" provisions. (C.T. 293).

Petitioner appealed, and, on November 17, 1998, the California Court of Appeal affirmed petitioner's conviction. (Return, Exh. B, at 40). After the Court of Appeal denied petitioner's petition for rehearing, petitioner filed a petition for review in the California Supreme Court. (Return, Exhs. C, D, at 41-42). On January 27, 1999, the California Supreme Court

denied the petition for review without comment or citation to authority.[1] (Return, Exh. E, at 73).

Petitioner filed his present federal Petition for Writ of Habeas Corpus on March 22, 1999. Respondent filed the Return on May 24, 1999. Petitioner filed the Traverse on July 1, 1999. The matter is now deemed submitted and ready for decision.

STATEMENT OF FACTS

On January 8, 1996, petitioner was arrested at the conclusion of an undercover police drug purchase. Petitioner was charged in an information, filed on February 5, 1996, with a single count of selling cocaine. (C.T. 54-56). The information also alleged that petitioner suffered two prior serious felony convictions for residential burglary in 1980 and 1988. (C.T. 54-55). Co-defendants Jose Flores and Tyrone Jennings were also charged with selling cocaine in the same count. (C.T. 54).

A jury trial of petitioner and his co-defendants began on August 6, 1996. (C.T. 91). Petitioner testified at his first trial. (2 Reporter's Transcript ("R.T.") at 483-519). At petitioner's request, Judge Albert Matthews instructed the jury on entrapment. (2 R.T. 542; 3 R.T. 550, 632-34). During deliberations, the jury sent out two notes with questions regarding the entrapment instructions. (C.T. 100-01). After three days of deliberation, the jury reached a verdict as to petitioner's co-defendants, Flores and Jennings. (C.T. 103; 4 R.T. 35-38[2]). The jury found both defendants guilty of sale,

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1. Because the California Supreme Court did not provide reasons for rejecting petitioner's claims, this court "looks through" the highest court's silent denial to the last reasoned judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590 (1991). In this case, that is the decision by the California Court of Appeal.

2. The final part of petitioner's first trial before Judge Matthews is bound with the transcript of his second trial before Judge Fisher. In addition, this volume of the Reporter's Transcript on Appeal is incorrectly captioned as volume 2 of 3 volumes, pages 34-325. To avoid confusion, the court shall refer to this transcript volume as volume 4 of 5 volumes, pages

transportation or offer to sell cocaine. (*Id.*) The jury could not, however, reach a verdict as to petitioner. (C.T. 103; 4 R.T. 38-39). On a vote of 11-1, the jury deadlocked. (4 R.T. 39). The trial court, thereafter, declared a mistrial as to petitioner. (C.T. 103; 4 R.T. 42).

On December 19, 1996, petitioner was retried before Judge John Fisher. (C.T. 118; 4 R.T. 66). The prosecution adduced the following evidence. In the evening on January 8, 1996, two Los Angeles police officers, Servando Pena and Melissa Town, were participating in an undercover narcotics operation. (4 R.T. 81). Offficers Pena and Town were driving an unmarked car in an area known for narcotics trafficking. (4 R.T. 82, 141-42, 175). Pena pulled his car over, motioned to petitioner's former co-defendant, Flores, to come over, and asked Flores if he could hook Pena up with twenty dollars worth of narcotics. (4 R.T. 83, 106-07). Flores said he did not have any drugs but could take Pena to get some. (4 R.T. 84). When Pena said, "let's go get some," Flores got in the car with the undercover officers. (4 R.T. 132).

Pena testified that Flores clearly expected to use some of the narcotics that he was helping the undercover officers locate. (4 R.T. 108). In fact, even after Pena told him that Pena did not intend to give any of his drugs away, Flores continued to importune Pena for some of the drugs that he was hoping to obtain.[3/] (4 R.T. 108, 115, 119).

Pena knew something was physically wrong with Flores. (4 R.T. 132). After getting into the car, Flores told the undercover officers he was desperate for cocaine, and hadn't had any drugs for two days. (4 R.T. 107-08, 111, 113, 119). Pena believed Flores was visibly suffering the symptoms of drug withdrawal. (4 R.T. 143). Flores smelled strongly of alcohol, he was pale, his hands were visibly shaking, his head continuously jerked

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34-325, and the court shall refer to the remaining transcript as volume 5 of 5 volumes, pages 326-656.

3. Although Pena testified that he later informed Flores of his intention not to share narcotics, Pena did not tell Flores that fact immediately. (4 R.T. 119).

from side to side and, during the ride, Flores had to leave the car to vomit. (4 R.T. 108, 110-11, 116, 142-43).

Flores directed the undercover officers to drive toward Magnolia and Riverton, which was about a mile away, but didn't tell the officers that he was looking for anyone in particular. (4 R.T. 84-85, 132-33). At a liquor store at Magnolia and Riverton, Flores got out of the car and vomited. (4 R.T. 133, 301). Moments after being ill, Flores saw petitioner and approached him. (4 R.T. 301, 314).

Walking up to petitioner, Flores said: "I'm hurting" and "I need a fix." (4 R.T. 218, 244-46). According to petitioner, Flores smelled of alcohol and vomit, was trembling "like a junky dude" and seemed to be sick "like a dope fiend." (4 R.T. 218-19, 222, 230). As did Officer Pena, petitioner concluded that Flores was experiencing drug withdrawal because Flores was sick, and was "tweaking and twitching." (4 R.T. 222, 230). Flores repeatedly asked petitioner to help him and said repeatedly, "I need some, man." (4 R.T. 246). Although petitioner had no drugs to sell, and knew Flores only very casually, he directed Flores to a particular location on Cleon Street where dealers congregated. (4 R.T. 243-44, 247-48). Petitioner, who was riding his bicycle home from work, then rode off to the same location. (4 R.T. 220-21, 248).

After speaking with petitioner, Flores returned to the undercover vehicle and told Pena to drive to the liquor store at Vineland and Magnolia. (4 R.T. 136, 301). Shortly thereafter, near the intersection of Magnolia and Cleon, petitioner waved to Flores and signaled to the undercover car to pull over. (4 R.T. 302-03). Petitioner approached the car and Flores handed petitioner Pena's twenty dollar bill.[4] (4 R.T. 220-21, 304).

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4. The testimony of the two officers differed regarding petitioner's statements during this encounter. According to Officer Pena, petitioner told him not to worry about getting "ripped off" because the petitioner did drug transactions such as this one "all the time." (4 R.T. 90). Officer Town recalled that petitioner had a different response to the officers' stated concern that petitioner would take the money and disappear. According to Town, petitioner said that Flores knew how to reach him if he were to take off, and that he didn't intend to do so. (5 R.T. 340-41). Neither Officer

Petitioner then went to look for a dealer for Flores. (4 R.T. 220-21, 249-50). When petitioner was unsuccessful, he returned to the car and gave the twenty-dollar bill back to Flores. (4 R.T. 221, 304). Shortly afterward, petitioner saw the person he had been looking for, and he stopped and flagged down the undercover car. (4 R.T. 221-22). Petitioner told Flores and officers to go over to the liquor store at Magnolia and Vineland. (4 R.T. 222, 304-05).

Petitioner rode over to the liquor store. (4 R.T. 224, 305). Petitioner approached his former co-defendant Jennings in the parking lot. (4 R.T. 225). Petitioner asked Jennings where petitioner "could get something at." (4 R.T. 225). Jennings walked into the store, and petitioner waited outside. (4 R.T. 225-26). When Jennings left the store, petitioner walked over to Flores and got two ten-dollar bills from Officer Town. (4 R.T. 226, 305). Petitioner then walked back over to Jennings, and told Jennings that he wanted to "get a 20" for Flores. (4 R.T. 227-28). Jennings and petitioner walked together for a short distance, and then petitioner gave Jennings money in exchange for rock cocaine.[5/] (4 R.T. 228-29). Next, petitioner walked back to the undercover car and handed a rock of cocaine to Pena. (4 R.T. 229-30, 306). After that, petitioner walked away, pushing his bicycle. (4 R.T. 230, 263).

After receiving the cocaine, Pena signaled to the back-up

Town nor Officer Pena recorded petitioner's statements in the police report prepared on the evening of petitioner's arrest. (4 R.T. 122; 5 R.T. 338, 340-41).

5. Although the testimony was contradictory, petitioner claimed that he received no drugs or other compensation for helping Flores obtain drugs. (4 R.T. 229-30). Although Officer Pena testified that he saw two rocks of cocaine in petitioner's hand, Pena never mentioned the second rock to his partner, Town. (4 R.T. 120; 5 R.T. 340). Nor did the police report prepared the evening of petitioner's arrest mention a second rock of cocaine in petitioner's hand. (4 R.T. 120, 170). Nor did Pena testify about a second rock of cocaine at the preliminary hearing in petitioner's case. (4 R.T. 120, 170). The police did not recover a second rock of cocaine when they arrested petitioner. (4 R.T. 152).

officers that he had completed a confirmed buy. (4 R.T. 306). Petitioner was arrested almost immediately thereafter. (4 R.T. 104). When they arrested petitioner, the police found no drugs on him. (4 R.T. 292).

Petitioner's principal defense was entrapment. During the prosecution case, the state read into evidence petitioner's testimony at his first trial. (4 R.T. 214-56). In that testimony, petitioner admitted he purchased rock cocaine from Jennings for the sole purpose of helping Flores, who was sick. (4 R.T. 232). Petitioner testified that he had no intention of buying or selling drugs before meeting Flores, and that he did so to help a person in need. (4 R.T. 255).

At the conclusion of the evidence, but before closing argument, defense counsel requested that Judge Fisher instruct the jury on the defense of entrapment. (5 R.T. 375, 377). As defense counsel noted, Mr. Bradley "took the stand" and "related why he did what he did under the circumstances." (5 R.T. 377). The state objected. (5 R.T. 377). Without explanation, Judge Fisher denied defense counsel's request and refused to give any instructions with regard to entrapment. (C.T. 176-79; 5 R.T. 377). On December 27, 1996, the jury convicted petitioner of selling cocaine.[6] (C.T. 182, 192-93; 5 R.T. 426-28).

PETITIONER'S CONTENTIONS

1. The trial court's failure to instruct on entrapment deprived petitioner of due process. (Petition, ¶ 10a, at 6 & attachment).

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6. In petitioner's new trial motion, he submitted two affidavits from jurors from the second trial. (C.T. 210-11, 215-24). Jurors Ernest Rivers, Jr., and Jose Escobido stated that, had they been given petitioner's requested entrapment instructions, "the jury verdict (or the jury's ability to reach a unanimous verdict) would have been different." (C.T. 210, 216, 221). Both jurors stated that their impression of the evidence could have supported a finding of entrapment. (C.T. 216, 221). The Court of Appeal denied petitioner's request to take judicial notice of these declarations. (Return, Exh. B, at 32, n.2).

2. The conduct of the police officers was sufficiently outrageous to deny petitioner due process. (Petition, ¶ 10b, at 6 & attachment).

3. Petitioner's sentence under the "three strikes" statute is cruel and unusual punishment. (Petition, ¶ 10c, at 7 & attachment).

STANDARD OF REVIEW

This court may grant federal habeas corpus relief only if petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). State law errors are not cognizable on federal habeas corpus. *Id.; Estelle v. McGuire,* 502 U.S. 62, 67, 112 S. Ct. 475, 480 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 874 (1984). The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes new requirements for the granting of habeas relief:[7/]

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with the respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1997) (as amended).

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7. Because petitioner filed the Second Amended Petition after April 24, 1996, the AEDPA's effective date, it is subject to the AEDPA's provisions. *See Lindh v. Murphy*, 521 U.S. 320, 335, 117 S. Ct. 2059, 2068 (1997).

Further, if this court identifies a cognizable error during petitioner's trial, it must further determine whether that defect constitutes a structural error or trial error. Trial errors are those "which occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed" within the context of the trial as a whole to determine whether they are harmless. *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264 (1991). Structural errors, by contrast, are defects "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.*, at 310, 111 S. Ct. at 1265.

Where a trial error is identified, the petitioner must show that he has suffered "actual prejudice" as a result. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993). However, the Supreme Court has added in reference to trial errors that "where a judge, in a habeas proceeding, applying this standard of harmless error, 'is in grave doubt as to the harmlessness of the error,' the habeas petitioner must win." *California v. Roy*, 519 U.S. 2, 5, 117 S. Ct. 337, 338 (1996) (*citing O'Neal v. McAninch*, 513 U.S. 432, 437, 115 S. Ct. 992, 995 (1995)). Therefore, without shifting the burden of establishing whether the error was prejudicial, the harmlessness standard involved places the risk of doubt on the State. *O'Neal*, 513 U.S. at 439, 115 S. Ct. at 996.

DISCUSSION

A. Habeas Relief Is Justified on Petitioner's First Claim.

Petitioner's first claim alleges that the trial court's refusal to instruct on entrapment precluded the jury from considering his principal defense, thereby violating his right to due process. To prevail on this claim in a collateral proceeding such as this one, petitioner must establish that (1) he was entitled under California law to an instruction on entrapment; and (2) that the evidence supported the instruction. In addition, petitioner must demonstrate that the omission of the instruction was so prejudicial that it will support a collateral attack on the

constitutional validity of a state court's judgment. *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 1737 (1977). The question in a habeas proceeding is whether "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400 (1973).

Further, if the court determines that a federal constitutional error occurred, it must then decide whether the error, if any, was contrary to, or an unreasonable application of, clearly established federal law. *See Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000) (requiring two-step inquiry to determine whether relief may be granted under Section 2254(d), *pet. for cert. filed* (No. 00-255, August 11, 2000).

1. The Trial Court's Refusal to Give the Requested Entrapment Instructions Deprived Petitioner of Due Process.

In California, the test for entrapment asks whether the conduct of the law enforcement officer, or his agent, was likely to induce a normally law abiding person to commit the offense.[8/] *People v. Barraza*, 23 Cal. 3d 675, 689-90, 153 Cal. Rptr. 459, 467, 591 P.2d 947, 955 (1979). Although the law presumes that a law abiding person would normally resist the temptation to commit crime when presented with nothing more than the simple opportunity to act unlawfully, the defense of entrapment recognizes that it is impermissible for the police or their agents to "pressure the suspect by overbearing conduct, such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law abiding person to commit the crime." *Id.* Thus, if the actions of an officer or his agent would induce a person to commit the illegal act "because of friendship or sympathy, instead of a desire for personal gain or

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8. In California, entrapment can be accomplished either directly by the police, or indirectly through an unwitting agent. *People v. McIntire*, 23 Cal. 3d 742, 748, 153 Cal. Rptr. 237 (1979).

other typical criminal purpose," the defense of entrapment will be established. *Id.*

In his second trial, petitioner adduced substantial evidence to support a defense that he had been induced by Flores, acting under a plan conceived of an executed by the undercover officers, to purchase drugs for Flores out of concern for his physical well-being, and sympathy for the his plight. Flores, the person the police employed as their "hook," was a drug-addict visibly going through the physical symptoms of withdrawal. As described by both petitioner and the police, Flores was pale, he reeked of alcohol, his hands were trembling, and his head was continuously twitching. During the operation, Flores got out of the police car, and in the presence of both the officers and petitioner, was violently ill. Immediately after he vomited, Flores approached petitioner and begged petitioner to assist him in obtaining a fix. Flores told both petitioner and the undercover officers that he was desperate. Further, the prosecution presented scant evidence to tie petitioner into the regular use or sale of drugs.[9/] And, nothing in the record suggested that Flores sought out petitioner as a known source of drugs, nor could the prosecution establish conclusively that petitioner obtained any personal benefit from his intercession.[10/] *See, e.g., Sherman v. United States*, 356 U.S. 369, 375, 78 S. Ct. 819, 822 (1958). The evidence, therefore, presented the issue of whether petitioner's conduct had been induced, rather than the independent product of avarice or criminal intent. *Id.*, 356 U.S. at 377, 78 S. Ct. at 823.

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9. Although Pena testified that petitioner told the undercover officers that he routinely engaged in drug transactions, Officer Town recalled no such statement being made. Further, either Officer Town nor Officer Pena recorded any statements by petitioner in the contemporaneous police report.

10. Although Officer Pena testified that petitioner received a second rock of cocaine during the transaction, that testimony was undercut by Pena's failure to mention the second rock to his partner, or to include that fact in the police report, or to testify about the second rock at the preliminary hearing. It was, however, uncontroverted that when searched by the police at the time of his arrest (moments after handing one rock to Pena), petitioner had no drugs.

Further, petitioner has met his "especially heavy" burden of showing that the error so infected his trial as to violate due process.[11/] *Henderson v. Kibbe, supra*, 431 U.S. at 115, 97 S. Ct. at 1737; *see also Estelle*, 502 U.S. at 72, 112 S. Ct. at 482. Petitioner's principal defense was that he had been entrapped by the police into providing drugs for Flores. In fact, during his testimony at the first trial (which the prosecutor read to the jury at petitioner's second trial), petitioner admitted to buying cocaine for Flores, but then went on to explain that he had been induced to do so by the man's obvious illness, and by his sympathy for Flores' plight. By refusing to instruct the jury on entrapment, the trial judge essentially left the jury with petitioner's confession to the offense, without ever allowing them to consider petitioner's preclusive defense. By rejecting petitioner's request for an entrapment instruction, the trial court effectively deprived petitioner of his only defense. That deprivation "so infected the entire trial" that the resulting conviction violates due process. *Henderson, supra*, 431 U.S. at 156-57, 97 S. Ct. at 1738.

2. The California Courts' Decision Rejecting Petitioner's Claim of Instructional Error Was an Unreasonable Application of Clearly Established Federal Law.

Having concluded that the omission of entrapment instructions constitutes constitutional error, the court must still determine whether that error is contrary to or involves an unreasonable application of federal law as determined by the

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11. Respondent does not address the issue of prejudice, opting instead to rely solely on the argument that the trial court's refusal to give entrapment instructions was not objectively unreasonable.

United States Supreme Court.[12] 28 U.S.C. § 2254(d)(1); *Van Tran v. Lindsey, supra*, 212 F.3d at 1154-55.

This court concludes that it is. It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case, where that defense is supported by some evidence and is legally permissible.[13] *See Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 887 (1988); *see also United States v. Mason*, 902 F.2d 1434, 1437 (9th Cir. 1990); *Conde v. Henry, supra,* 198 F.3d at 739 (state habeas case). *See also Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984). The California Court of Appeal's decision not to apply this legal rule in petitioner's case was objectively unreasonable. It was not objectively reasonable for the state court to characterize the use of a visibly ill drug addict to entreat passers-by to alleviate his suffering as an "ordinary, run-of-the-mill, undercover drug operation." (Return, Exh. B, at 31). To rule, as did the appellate court, that the police did "nothing more" than present petitioner with "the simple opportunity to act unlawfully" is clearly erroneous given the record in this case. Further, as there was a factual and legal basis for petitioner's defense theory of entrapment, the state court's refusal to consider the petitioner's due process claim was an objectively unreasonable application of federal law. *See*

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12. The issue of whether the state court's jury instructions have denied a habeas petitioner due process is purely a legal issue which, prior to AEDPA, was reviewed de novo. *Willard v. People of the State of California*, 812 F.2d 461, 462 (9th Cir. 1987). The issue of whether the instructional error is of constitutional dimension is a mixed question of law and fact. *Herd v. Kincheloe*, 800 F.2d 1526, 1528 (9th Cir. 1996). The presumption of correctness which applies to state court findings of historical fact under 28 U.S.C. § 2254(e)(1) does not apply to the state courts' determinations on these issues. *See Thompson v. Keohane*, 516 U.S. 99, 109-10, 116 S. Ct. 457, 464 (1995).

13. Ninth Circuit authority, such as that cited here, "may be persuasive authority for purposes of determining whether a particular state court determination is 'an unreasonable application' of Supreme Court law, and may also help determine what law is 'clearly established.'" *Van Tran,* 212 F.3d at 1154.

Williams v. Taylor, ___ U.S. ___, ___, 120 S. Ct. 1495, 1520 (2000) ("[A] state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of . . . clearly established federal law.")

3. The State Court's Error Requires that Petitioner's Conviction Be Vacated.

Having concluded that the trial court's failure to instruct the jury on entrapment constitutes constitutional error, and that the AEDPA does not bar relief, the question remains whether the error requires reversal.

To be entitled to habeas relief, the petitioner must show that he has suffered "actual prejudice" as a result of the constitutional error.[14/] *See Brecht v. Abrahamson, supra*, 507 U.S. at 637, 113 S. Ct. at 1722; *California v. Roy, supra*, 519 U.S. at 5, 117 S. Ct. at 338.

At a minimum, the jury's conviction of petitioner based on a set of instructions that omitted a preclusive defense warrants "grave doubt as to the harmlessness of the error." *See O'Neal, supra,* 513 U.S. at 437, 115 S. Ct. at 995. Prejudice, of a nature and degree so significant as to infect the entire trial, cannot be avoided where, as in this case, the instructions embodied petitioner's principal defense. *See Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995) ("Whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions give to the jury."). By refusing petitioner's

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14. Although some jury instruction errors are so fundamental that they constitute structural error and require automatic reversal, *see Harmon v. Marshall*, 69 F.3d 963, 966 (9th Cir. 1995); *Conde v. Henry, supra*, 198 F.3d at 741, this court shall require that petitioner demonstrate actual prejudice. *See Villafuerte v. Stewart*, 111 F.3d 616, 623 (9th Cir. 1997) (applying *Brecht* to claims of instructional error); *see also Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833 (1999); *Stanton v. Benzler*, 146 F.3d 726, 728-29 (9th Cir. 1998).

requested entrapment instructions, the trial judge effectively rendered the state's charges uncontested.

Further, unlike many cases in which a petitioner must hypothesize a trial in which the jury received the challenged instructions, petitioner can point to the result obtained in his first trial, at which the jury was instructed on entrapment and could not reach a unanimous verdict as to petitioner.[15/] A comparison of the outcome in petitioner's two trials, therefore, creates grave doubt as to the harmlessness of the error.

In addition, the declarations of two jurors from petitioner's second trial support this court's conclusion that the trial court's failure to instruct the jury on entrapment affected the jury's deliberations. Both Juror Rivers and Juror Escobedo, after being shown petitioner's requested instructions on entrapment, stated that "the jury's ability to reach a unanimous verdict would have been different if these instructions had been given." (C.T. 216, 221).

In light of these facts, the court cannot conclude that the trial court's error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 623, 113 S. Ct. at 1714 (1993). The court, therefore, conditionally grants petitioner's writ of habeas corpus as to claim one.

B. The Officers' Conduct Did Not Violate Due Process.

Petitioner's second claim asserts that the officers' use of a drug-addicted decoy to entreat petitioner to engage in a cocaine transaction violated his right to due process. Relying on cases in which the Supreme Court found certain police methods "too close to the rack and the screw" to pass constitutional muster,

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15. That the jury considered those instructions during their deliberations is evidenced by the jury's two notes with questions regarding the law of entrapment. *Cf. Villafuerte, supra*, 111 F.3d at 622 (court considered jury communications during deliberations as evidence that the jury has not felt bound to find defendant guilty of murder if it found defendant guilty of kidnaping).

petitioner asserts that the officers' use of an apparently sick person, who was withdrawing and desperately needing drugs, as a hook for an undercover drug operation was outrageous and shocking to the conscience.

The California Court of Appeal found no deprivation of petitioner's due process rights by the officers' conduct. (Return, Exh. B, at 33). This conclusion is not contrary to or an unreasonable application of federal law. In *United States v. Russell*, 411 U.S. 423, 432-32, 93 S. Ct. 1637, 1643 (1973), the Supreme Court considered whether an undercover officer's infiltration of a drug ring, and his limited participation in the illicit manufacture of drugs, violated fundamental fairness mandated by the due process clause. The majority noted that gathering of evidence regarding the illicit manufacture of drugs often requires officers to infiltrate illegal enterprises and to offer something of value to be taken into the confidence of "the illegal entrepreneurs." *Id.* Such law enforcement tactics neither violated fundamental fairness nor shocked the universal sense of justice. *Id.*

The California appellate court's decision that the officers' conduct in this case similarly did not violate due process cannot be said to be contrary to, or an unreasonable application of, federal law. *See Williams, supra*, ___, U.S. at ___, 120 S. Ct. at 1523. As noted in an earlier decision, *Rochin v. California,* 342 U.S. 165, 172-73, 72 S. Ct. 205, 209-10 (1952), only those practices that go well beyond "certain decencies of civilized conduct," will offend due process. Thus, while this court may consider the officers' conduct to have created the possibility of a claim of entrapment, the state court's conclusion that the officers did not offend a universal sense of justice was not "clearly erroneous." *Weighall v. Middle*, 215 F.3d 1058, 1062 (9th Cir. 2000) (*citing Van Tran v. Lindsey, supra*, 212 F.3d at 1152-54).

Petitioner's second claim, therefore, must be dismissed with prejudice.

C. Petitioner's Sentence Does Not Violate the Eighth Amendment Proscription Against Cruel and Unusual Punishment.

Petitioner's third claim is that his sentence of twenty-five years to life violates the constitutional prohibitions on cruel and unusual punishment.

The California Court of Appeal rejected this argument. (Return, Exh. B, at 38). The state court concluded that petitioner's sentence was not disproportionate when considered in light of the nature of the offense and the offender, and in light of punishments imposed in California and in other jurisdictions. (*Id.*, at 39-40). Specifically, the Court of Appeal noted petitioner's extensive criminal history, including convictions for two burglaries, a narcotics offense, and grand theft auto. (*Id.*, at 39). "[Petitioner's] recidivism and the severity of his past and present crimes justify the term imposed." (*Id.*) Further, petitioner's long criminal history makes his current sentence proportional to those imposed on criminal recidivists, both in California and in other jurisdictions. (*Id.*, at 40).

The California Court of Appeal's conclusion is neither contrary to, nor an unreasonable application of, federal law. 28 U.S.C. § 2244(d). The Eight Amendment does not demand strict proportionality between crime and sentence. "Rather, it forbids only extreme sentences that are "grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring, constituting the holding of the Court). Petitioner's sentence, when considered in light of his prior court of criminal conduct, is not "grossly disproportionate." *Solem v. Helm*, 463 U.S. 227, 296, 103 S. Ct. 3001, 3013 (1983) ("a state is justified in punishing a recidivist more severely than it punishes a first offender").

Nor is petitioner's twenty-five years to life sentence as a recidivist disproportionate when compared to other sentences which the Supreme Court has affirmed in face of constitutional challenges. *See Harmelin*, 501 U.S. at 1002, 111 S. Ct. at 2704

(affirming a sentence of life without parole for a first offense of possession of 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370-71, 375, 102 S. Ct. 703, 703-04, 706 (1982) (rejecting challenge to a forty-year sentence for possession of less than nine ounces of marijuana); *Rummel v. Estelle,* 445 U.S. 263, 265-76, 100 S. Ct. 1133, 1134 (1990) (upholding life sentence under recidivist statute for uttering "no account" check for $100, where two earlier felonies involves theft of less than $129).

Petitioner's third claim, therefore, must be dismissed with prejudice.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered: (a) conditionally granting the writ of habeas corpus on claim one and directing that, unless, within sixty days of the issuance of the mandate in this case, the State of California grants petitioner a new trial at which petitioner may present, and the jury shall be instructed on, petitioner's entrapment defense, petitioner be released from custody; and (b) denying petitioner's second and third claims with prejudice.

DATED: September 13, 2000.

/s/_____
Ann I. Jones
United States Magistrate Judge

APPENDIX C

FILED
JAN 5 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY BRADLEY,	) No. EDCV 00-527
	) VAP (AIJ)
Petitioner,	)
	) **ORDER ADOPTING**
v.	) **FINDINGS,**
	) **CONCLUSIONS AND**
WILLIAM DUNCAN, Warden,	) **RECOMMENDATIONS**
	) **OF UNITED STATES**
Respondent.	) **MAGISTRATE JUDGE**
	)

Pursuant to 28 U.S.C. § 636, the court has reviewed the petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered: (a) conditionally granting the writ of habeas corpus on claim one of the petition and directing that, unless, within sixty days of the issuance of the mandate in this case, the State of California grants petitioner a new trial at which petitioner may present, and the jury shall be instructed on, petitioner's entrapment defense, petitioner be released from custody; and (b) denying petitioner's second and third claims with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on petitioner and on the attorney's for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 20, 2000.

/s/
Virginia A. Phillips
United States District Judge

APPENDIX D

FILED
JAN 5 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY BRADLEY, Petitioner,	) No. EDCV 00-527 VAP (AIJ)
v.	) **JUDGMENT**
WILLIAM DUNCAN, Warden, Respondent.	)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that:

(a) The petition for writ of habeas corpus is conditionally GRANTED on claim one. Unless, within sixty days of the issuance of the mandate in this case, the State of California grants petitioner a new trial at which petitioner may present, and the jury shall be instructed on, petitioner's entrapment defense, petitioner shall be released from custody.

(b) The second and third claims of the petition are DENIED with prejudice.

DATED this 20th day of December, 2000.

/s/
Virginia A. Phillips
United States District Judge

APPENDIX E

FILED
MAY 14 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY BRADLEY, Petitioner-Appellee, v. W. A. DUNCAN, Warden, Respondent-Appellant.	No. 01-55290 D.C. No. CV-00-00527-VAP Central District of California, Riverside **ORDER**

Before: FERGUSON, TASHIMA, and GRABER,
Circuit Judges.

Judge Graber has voted to grant the petition for panel rehearing and petition for rehearing en banc. Judges Ferguson and Tashima have voted to deny the petition for panel rehearing. Judge Tashima has voted to deny the petition for rehearing en banc and Judge Ferguson so recommends.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX F

[EXCERPTS OF STATE COURT OF APPEAL OPINION]

FILED
NOV 11 1998

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE**

THE PEOPLE, Plaintiff and Respondent, v. GARY BRADLEY, Defendant and Appellant.	B112640 (Super. Ct. No. LA022948-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sandy Kriegler, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

Appellant and defendant Gary Bradley appeals from his conviction on one count of selling cocaine. (Health & Saf. Code, § 11352, subd. (a).) Appellant was sentenced to prison for 25 years to life.

Appellant contends: (1) the trial court prejudicially erred in refusing to instruct on entrapment; (2) the conduct of the police officers deprived him of his due process rights; (3) the trial court prejudicially erred in refusing to instruct on the lesser related instruction of solicitation; (4) the trial court erred in failing to respond to an inquiry from the jury; (5) the trial court abused its discretion in refusing to strike a prior conviction; and, (6) appellant's sentence constitutes cruel and unusual punishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *Prosecution case.*[1/]

On the afternoon of January 8, 1996, Los Angeles Police Officers Servando Pena and Melissa Town were working undercover narcotics. The officers were posing as drug buyers. Officer Pena was driving an unmarked patrol car; Officer Town was in the front passenger's seat. Officer Pena was wired electronically.

Jose de Jesus Flores was walking down the street at approximately 6 p.m. that evening. Officer Pena called Flores over to the car and asked if Flores could "hook me up with a 20," i.e., could Flores find $20 worth of narcotics. Flores said he did not have any drugs, but he could take the officers to where some could be obtained. Officer Pena wanted to use Flores as a "hook," or a person who would take the officers to a drug dealer.

Officer Pena smelled alcohol on Flores's breath. Flores displayed drug withdrawal symptoms. His hands were shaking

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1. In the first trial, appellant testified in his own defense. In the second trial, the prosecution presented appellant's prior testimony in the People's case-in-chief.

and his skin was pale. Flores said he had not had any cocaine in two days and was desperate to obtain some. Officer Town moved into the back seat; Flores got in the front seat. Flores stated he would find someone from whom cocaine could be bought and he wanted to keep some for himself. Officer Pena told Flores he could not receive any cocaine from the officers.

Flores directed Officer Pena to drive toward Magnolia and Riverton Streets. As they approached that location, Flores saw appellant riding a bicycle. Appellant had previously seen Flores "in passing," i.e.. when appellant went back and forth from work. Flores directed Officer Pena to follow appellant, indicating appellant was the person he was trying to find. The car was stopped. Flores got out of the car and threw up. Flores went to talk to appellant. Flores told appellant he was hurting and needed drugs. Flores asked appellant to obtain drugs for him. Appellant thought Flores was an addict. Flores appeared sick; he was trembling. Appellant told Flores he would try and obtain some drugs from people appellant knew on the street.

Flores re-entered the unmarked patrol car and directed Officer Pena to drive to a nearby liquor store and to follow appellant, who was still riding his bicycle. At appellant's directions, the officers stopped the car. Appellant approached the unmarked police vehicle and asked Flores for money Officer Pena handed Flores a premarked $20, which Flores gave to appellant. Officer Pena told appellant not to "rip [them] off." Appellant responded, "don't worry, I do this all the time."

Appellant rode off, on his bicycle. Appellant returned approximately three minutes later and gave the money back to Flores, stating, "The guy is not home." Flores handed the $20 back to Officer Pena. Officer Pena began to drive away, but was flagged down by appellant. Appellant told the officers to meet him at a liquor store down the street.

Appellant approached Tyrone Lamont Jennings, who was standing in front of a store. The officers stopped nearby. Appellant approached the police car and asked for money. Officer Town handed appellant $20 (two prerecorded $10 bills). Appellant took the money and rode away on his bicycle. Appellant then approached Jennings and asked if he could buy

"a $20." Appellant and Jennings walked down the alley. Jennings gave appellant a rock of cocaine in exchange for the two $10 bills. Appellant went to the patrol car and handed Officer Pena a rock of cocaine. Officer Pena thought appellant had another rock of cocaine in his hand. Officer Pena signaled to other officers that a buy had been made. Appellant, Jennings and Flores were arrested.

b. *The defense.*

Robert Esty, a music writer, arranger, and producer, lived in North Hollywood. He testified appellant worked for him on January 8, 1996. Appellant moved studio equipment and did yard work.

2. *Procedure.*

Appellant was tried by jury, along with Jennings and Flores. Jennings and Flores, who are not parties to this appeal, were each convicted on one count of selling cocaine. (Health & Saf. Code, § 11352, subd. (a).) Appellant admitted he had suffered a prior conviction within the meaning of Health and Safety Code section 11370, subdivisions (a) and (c). The jury could not reach a verdict as to appellant and a mistrial as to him was declared.

In the second trial, appellant was convicted on one count of selling cocaine. (Health & Saf. Code, § 11352, subd. (a).) In two bifurcated proceedings, the jury found true that appellant had been convicted of burglary in 1980 and again in 1988. (Pen. Code, §§ 1170.12, subds. (a) - (d), 667, subds. (b) - (i).)

Appellant was sentenced to 25 years to life.

DISCUSSION

1. *The absence of an entrapment instruction does not warrant reversal.*

a. Appellant contends the trial court refusal to instruct on entrapment constitutes reversible error. We find this contention unpersuasive.

b. *Additional facts.*

In the first trial, the jury was instructed on entrapment. In the second trial, the trial court refused appellant's request for entrapment instructions. (CALJIC Nos. 4.60, 4.61 and 4.61.5.)

c. *Discussion.*

"The California entrapment doctrine is known as an objective defense because it focuses exclusively on police conduct and ignores the suspect's subjective intent or any predisposition to commit the crime. [T]he basis of the defense is to deter police misconduct. [Citation.]" (*People v. Holloway* (1996) 47 Cal.App.4th 1757, 1764-1765, overruled on other grounds in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

"[T]he proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect–for example, a decoy program–is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

"Although the determination of what police conduct is impermissible must to some extent proceed on an ad hoc basis, guidance will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of such conduct would be an appeal by the police that would induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute

entrapment. Such conduct would include, for example, a guarantee that the act is not illegal. . . ." (*People v. Barraza* (1979) 23 Cal.3d 675, 689-690, fn. omitted.)

"There will be no entrapment . . . when the official conduct is found to have gone no further than necessary to assure the suspect that he is not being 'set up.' The police remain free to take reasonable, though restrained, steps to gain the confidence of suspects." (*People v. Barraza, supra,* 23 Cal.3d at p. 690, fn. 4.)

Courts have no duty to give a requested instruction when there is no substantial evidence in support thereof. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.) "Failure to give entrapment instructions constitutes reversible error when substantial evidence to sustain the defense is offered or introduced." (*People v. McIntire* (1979) 23 Cal.3d 742, 746.)

Here, there was no substantial evidence to support entrapment instructions. This was an ordinary, run-of-the-mill, undercover drug operation in which a decoy was used. The officers used Flores as a "hook" in locating a source for cocaine; appellant expressed his willingness to assist in finding cocaine, and appellant took actions toward accomplishing that goal. He located a source for the drugs and exchanged money for the drugs. The police did not conduct themselves improperly. Neither officer badgered, cajoled, nor did any other affirmative act likely to induce a normally law-abiding person to commit the crime. Appellant was simply offered the opportunity to commit the crime.

Appellant contends the police improperly induced appellant to commit the crime. He argues he was induced to commit the criminal act because he acted only to help Flores, an obviously ill person. According to appellant, the police preyed on appellant's human instincts of friendship or sympathy.

However, the average person would not, as appellant contends, purchase illegal drugs to aid a stranger, even if the stranger appeared to be a drug addict going through withdrawal. The use of such a decoy would not constitute affirmative police conduct making commission of the crime unusually attractive

to a normally law-abiding person.[2] (Cf. *People v. Lee* (1990) 219 Cal.App.3d 829 [sailor working with police befriends drug dealer to assist in gaining dealer's confidence; such casual, brief, non-intimate acquaintances does not constitute entrapment]; compare with *People v. McIntire, supra*, 23 Cal.3d 742 [facts sufficient to raise entrapment defense when defendant acquiesces to strong and persistent pressure applied by police through defendant's younger brother based upon sympathy aroused by family problems].)[3]

Since there was no substantial evidence to support the defense of entrapment, the trial court did not err in refusing to instruct on that defense.

(2) *The conduct of the police officers did not deprive appellant of his due process rights.*

Appellant contends the actions of the police officers were outrageous and thus, constituted a denial of his due process rights. (*United States v. Russell* (1973) 411 U.S. 423.)[4]

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2. Attached to his motion for a new trial, appellant brought forth declarations from two jurors who stated that had there been instructions on entrapment, the verdict would have been not guilty. We deny appellant's request to take judicial notice of these declarations.

3. Appellant cites *People v. Lee, supra,* 219 Cal.App.3d 829 to support his argument. *Lee* concluded the facts did not constitute entrapment as a matter of law. Thereafter, the appellate court stated, "the court properly submitted the entrapment issue to the jury." (*Id.*, at p. 837.) In contrast to our case, in *Lee,* the defendant testified she had been "badgered" into selling drugs. *(Ibid.)*

To support his argument that entrapment instructions were warranted in the instant case, appellant also points to *People v. Mendoza* (1992) 8 Cal.App.4th 504. In *Mendoza*, the appellate court dealt with whether the defendant was entitled to a special instruction on derivative entrapment. The appellate court held such an instruction was unwarranted because there was no evidence that an intermediary was controlled or manipulated by the police. *Mendoza* concluded the evidence was insufficient to show entrapment, even if there was an unwitting agent. The defendant was a casual acquaintance of the intermediary whose financial needs would not induce the normal, law-abiding citizen into selling drugs.

4. The California entrapment defense differs from the federal one. California focuses on the actions of the police, whereas the federal defense

However, the police merely used a decoy during an undercover operation. Appellant was a willing participant from the beginning. Due process was not offended by the actions of the police, which were neither "outrageous" nor "gross."

(3) *The trial court did not prejudicially err in refusing to instruct on the lesser related instruction of solicitation.*

. . . .

(4) *The trial court did not err in the manner in which it responded to an inquiry from the jury.*

. . . .

(5) *The trial court did not abuse its discretion in refusing to strike a prior conviction.*

. . . .

(6) *Appellant's sentence does not constitute cruel and unusual punishment.*

. . . .

DISPOSITION

The judgment is affirmed.

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focuses upon the defendant's predisposition to commit the crime. Some California courts suggest there is no need to discuss the due process argument now being raised by appellant, as it is superfluous under the California concept of entrapment. (*People v. Thoi* (1989) 213 Cal.App.3d 689, 696; compare with *People v. Holloway, supra*, 47 Cal.App.4th at pp. 1763-1768 [outrageous police conduct exists in California independent of entrapment defense].) For purposes of discussion we assume appellant's argument is not superfluous.

Supreme Court, U.S.
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No. 03-249

IN THE SUPREME COURT FOR THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW respondent, GARY BRADLEY, by and through counsel, and requests leave to file the attached Respondent's Brief in Opposition and to proceed *in forma pauperis*.

Respondent is indigent. The undersigned counsel was appointed to represent respondent by the Court of Appeal for the State of California, Second Appellate District in his state appeal, the proceeding underlying the matter at bar. The undersigned counsel also was appointed to represent respondent by the United States Court of Appeals for the Ninth Circuit on February 10, 2003, *nunc pro tunc* to February 2, 2001, pursuant to the Criminal Justice Act of 1964, Title 18 United States Code, section 3006A(b).

No affidavit is attached, inasmuch as counsel is exempt therefrom pursuant to Title 18 United States Code, section 3006A(d)(7).

I declare under penalty of perjury the above stated matters are true and correct.

Dated: September 10, 2003

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No. 03-249

IN THE SUPREME COURT FOR THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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II. Certiorari is not warranted because the Ninth Circuit's holding does not conflict with decisions of this Court, and was based on a unique set of facts that are extremely unlikely to recur. 6

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No. 03-249

IN THE SUPREME COURT FOR THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Gary Bradley, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case, reported as *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002).

JURISDICTION

Respondent respectfully requests that this Court determine the case at bar is moot, insofar as the District Attorney for the County of Los Angeles, representing the People of the State of California, elected not to retry respondent within 60 days after the mandate issued and instead allowed that period to lapse, thereby facilitating respondent's release from prison. As an equitable matter, petitioner, also representing the People of the State of California, should be precluded from now seeking to reinstate respondent's judgment of conviction and sentence.

STATEMENT OF THE CASE

In early 1996, two undercover police officers enlisted Flores, who was exhibiting obvious symptoms of drug withdrawal, as an unwitting decoy to assist them in purchasing illicit drugs. Flores detained Bradley, who was riding his bicycle home from work, and vomited in front of him. Flores beseeched Bradley to help him obtain some drugs because he was withdrawing and gave him the $20 bill previously provided by the police. Bradley responded that he did not use drugs, but eventually managed to locate a street dealer and obtain a piece of cocaine weighing 0.17 grams for Flores. Bradley received no money or drugs for his services. He was about to continue his bicycle ride home when he was arrested.

At Bradley's trial in the California superior court, the undercover police officers described Flores's physical condition and actions. Bradley testified on his own behalf that he obtained the drugs for Flores out of sympathy for an obviously sick and desperate man. The court instructed the jury on entrapment, and after several days of deliberation and multiple requests for clarification on entrapment, the jury declared itself unable to reach a unanimous verdict.[1] The court declared a mistrial.

Bradley was tried on the same charge before a different judge. During his

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1. Under California law, entrapment occurs if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the criminal act other than ordinary criminal intent, including friendship or sympathy, rather than a desire for personal gain or other typical criminal purpose. California Jury Instructions, Criminal (CALJIC), No. 4.61. See Pet., App. A at A16. Petitioner cites for this proposition *People v. Reliford*, 28 Cal.4th 647 (2002). Pet. at 4. This citation is in error, and respondent is unaware of any case under this caption involving entrapment.

second trial, the prosecution introduced evidence virtually identical to the first trial. Defense counsel objected to the introduction of Bradley's testimony from his first trial as a violation of his Fifth Amendment right not to testify. See Appendix A.[2] The court overruled the objection and permitted Bradley's testimony -- in which he admitted every element of the offense charged -- to be read into the record. The court later, without any explanation, denied Bradley's request for entrapment instructions. See Appendix B. Bradley was convicted and sentenced to 25 years to life in prison, pursuant to California's Three Strikes laws.

After the California Court of Appeal affirmed Bradley's conviction, the California Supreme Court denied discretionary review.[3]

Bradley thereafter filed a petition for writ of habeas corpus in the United States District Court. The District Court adopted the federal magistrate's findings that the state trial court's refusal to instruct the jury on entrapment deprived Bradley of his right to due process of law. The District Court vacated Bradley's conviction and conditionally granted his petition for writ of habeas corpus, directing the State of California to retry Bradley within 60 days or release him from custody.

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2. In her dissent to the Court of Appeals' opinion, Judge Graber misstates the facts by claiming trial counsel "allowed" Bradley's testimony from the first trial to be read into the record. Pet., App. A. at A27.

3. After he filed his Appellant's Opening Brief in the state Court of Appeal, Bradley moved to amend his opening brief to include the argument that the trial court's actions denied his federal right to due process. The Court of Appeal denied Bradley's motion to amend. Bradley again raised a federal due process argument in a petition for rehearing to the Court of Appeal, which the court denied, and similarly raised that argument in his petition for review to the California Supreme Court.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's order granting habeas relief, finding the state appellate court's decision was an objectively unreasonable application of federal law, and also involved an unreasonable determination of the facts in light of the evidence presented.

The Court of Appeals denied petitioner's petition for rehearing and for hearing en banc and timely issued its mandate, thereby triggering the 60-day period within which to retry Bradley. Petitioner thereafter moved to recall and stay the mandate. The Court of Appeals denied petitioner's motion.

The District Attorney for the County of Los Angeles elected not to retry Bradley and instead allowed the 60-day period to lapse. The state therefore released Bradley from custody on August 4, 2003.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

As an equitable matter, review by this Court should be precluded because the District Attorney for the County of Los Angeles elected to allow Bradley's release from prison rather than subject him to a new trial.

A case becomes moot when it no longer satisfies the "case or controversy" requirement of Article III, Section 2 of the Constitution. See *Spencer v. Kenma*, 523 U.S. 1, 7 (1998). In the case at bar, the mandate issued and was spread in the District Court on June 5, 2003. The District Attorney for the County of Los Angeles, representing the People of the State of California, thereafter decided not to return Bradley to Los Angeles County for a new trial, reportedly because it was felt Bradley has served sufficient time in custody -- over seven and one-half years -- for his conduct.[4] The state therefore released Bradley from prison without obtaining or attempting to obtain a new conviction.

This executive decision having been made by a party representing the People of the State of California, there is no compelling reason for this Court to expend "scarce judicial resources," *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), on a matter which, in essence, already has been decided as a matter of policy.

Admittedly, a decision by this Court reversing the Ninth Circuit Court of Appeals could reinstate Bradley's original judgment of conviction and sentence. See

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4. As a matter of policy, Steve Cooley, the District Attorney for Los Angeles County popularly elected after Bradley was convicted, generally does not prosecute minor drug crimes as Three Strikes cases.

United States v. Villamonte-Marquez, 462 U.S. 579, 581, fn.2 (1983); *United States v. Sharpe*, 470 U.S. 675, 681, fn. 2 (1985). Here, however, the state evidently was content to allow Bradley to avoid a further conviction and incarceration.[5] Petitioner's subsequent attempt to undermine the policy determination of the local District Attorney's Office does not warrant this Court's attention. Based on principles of equity, this matter should not qualify as a continuing case or controversy.

II.

Certiorari is not warranted because the Ninth Circuit's holding does not conflict with decisions of this Court, and was based on a unique set of facts that are extremely unlikely to recur.

A. *Because the state trial court's refusal to instruct on entrapment, under the circumstances, cannot be considered a "mere error of state law," the Ninth Circuit's treatment of that error is in accord with decisions of this Court.*

In its opinion, the Ninth Circuit dutifully acknowledged this Court's precedents. In *Mathews v. United States*, 485 U.S. 58, 63 (1988), this Court held that, "[a]s a general proposition, a defendant is entitled to an instruction for which there exists evidence sufficient for a reasonable jury to find in his favor." In *California v. Trombetta*, 467 U.S. 479 (1984), this Court held

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5. Thus, this matter is distinguishable from *Sharpe*, *supra*, 470 U.S. at 681, fn. 2, where the Court found the case was not moot because the respondents had become fugitives after the Court granted certiorari. Here, by contrast, one state representative affirmatively decided not to retry Bradley before another state representative sought certiorari in this Court.

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a *meaningful* opportunity to present a complete defense.

Id. at 485 (emphasis added). The Court of Appeals also correctly observed that this Court's precedents encompass the legal principles flowing from those precedents. Pet., App. A at A15, citing *Williams v. Taylor*, 529 U.S. 362, 407 (2002); see also *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S.Ct. 490, 154 L.Ed2. 406 (2002).

Petitioner myopically characterizes Bradley's claim as addressing a "mere error of state law." Pet. at 6, 7, 8, 11. The federal due process violation here did not arise because the state court gave a jury instruction that was faulty under state law. This was not a case where, for example, "the contours of the defense, under [state] law, were not explained properly." *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999). To the contrary, the first trial court, finding adequate evidence to warrant such an instruction under state law, correctly instructed the jury on entrapment. The jury could not arrive at a unanimous verdict, despite several days of deliberation and multiple requests for clarification. On retrial before a different judge, the court refused to instruct on entrapment, but allowed the prosecution to introduce Bradley's testimony from the first trial, over defense objection. As the Ninth Circuit observed, quoting the District Court:

> By refusing to instruct the jury on entrapment, the trial judge essentially left the jury with [Bradley's] confession to the offense, without ever allowing them to consider [Bradley's] preclusive defense. By rejecting [Bradley's] request for an entrapment instruction, the trial court effectively deprived [Bradley] of his only defense.

Pet., App. A at A9.

It was upon this unique set of facts that the Ninth Circuit found a due process violation. Pet., App. A at A11-A12 ["*Under these circumstances*, the failure to instruct on entrapment prevented Bradley from presenting his full defense. Accordingly, due process was violated." (Emphasis added.)]. Petitioner overinflates the Ninth Circuit's decision as broadly "holding[] that the federal Constitution guarantees instructions on state-law affirmative defenses, ..." Pet. at 6. The Court of Appeals nowhere approached such an expansive holding. Nor did the Ninth Circuit hold as a general proposition, as petitioner claims, that "the Constitution requires jury instructions on state-law affirmative defenses that embrace facts beyond the elements of the charged crime." Pet. at 9. This, simply, is hyperbole.

The Ninth Circuit does not run afoul of this Court's "rule reaffirmed in *Estelle v. McGuire*[, 502 U.S. 62 (1991)] that instructional errors of state law *generally* may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) (emphasis added). As Justice O'Connor cautioned in *Taylor*:

> Although the Court's opinion today might be read as implying that erroneous jury instructions may never give rise to constitutional error outside of capital cases [citation], such an implication would misconstrue our precedent. When the Court states that "instructions that contain errors of state law may not form the basis for federal habeas relief" [citation], it must mean that a *mere* error of state law, one that does not rise to the level of constitutional violation, may not be corrected on federal habeas. Some erroneous state-law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case.

Id., 508 U.S. at 348-349 (O'Connor, J., concurring) (emphasis added). Justice O'Connor's concurrence comports with the holding of *Cupp v. Naughten*, 414 U.S.

141, 147 (1973), in which this Court ruled that for a petitioner to obtain relief based on a faulty jury instruction, the instruction "must so infect the entire trial that the resulting conviction violates due process."

Notably, *Estelle v. McGuire* does not hold that errors of state law may *never* provide the basis for habeas relief. Rather, *McGuire* allows that some ailing instructions by themselves might so infect the entire trial that the resulting conviction violates due process. *Id.*, 502 U.S. at 72, citing *Naughten*, 414 U.S. at 147. *McGuire* simply held that neither the admission of the challenged evidence in that case, nor the jury instruction used -- which only arguably misstated California law -- so infused the trial with unfairness as to deny due process of law. *Id.* at 75. In the case at bar, by contrast, the contrary rulings in the state courts below -- first instructing on entrapment, and later, after Bradley effectively confessed to the jury the elements of the crime, refusing to instruct on the only available defense to explain that confession -- "so infect[ed]" the procedures as to violate Bradley's federal due process. *Naughten*, 414 U.S. at 147; *McGuire*, 502 U.S. at 72. Petitioner's mantra that Bradley raised only a claim of "mere" state error seeks to obscure the unique factual circumstances that elevate this case to the realm of federal constitutional error.

Moreover, the Ninth Circuit was correct in rejecting the California Court of Appeal's legal conclusion that the evidence at Bradley's trial did not warrant instruction on entrapment. Pet. at 7-8. Clearly, at least one juror in Bradley's first trial believed he had been entrapped, *as defined under state law*. For the California Court of Appeal to have concluded otherwise, as a matter of law, the court had to presuppose that juror was *not* "reasonable." Yet the very foundation of American

jurisprudence rests on the belief that juries are comprised of "reasonable" people who follow the law as instructed.[6] See *Mathews*, *supra*, 485 U.S. at 63. As this Court long ago observed, "[T]he issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Sherman v. United States*, 356 U.S. 369, 377 (1958). The California Court of Appeal's conclusion that there was insufficient evidence of entrapment as a matter of California law usurped the function of the jury as fact-finders, and undermines the deference that courts must accord juries. Under the facts presented in this case, the California Court of Appeal's conclusion *was* "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Ninth Circuit was correct in granting habeas corpus relief on this basis.

Nor is certiorari warranted in this case in order to rectify the so-called "mischief" purportedly created in state courts by past Ninth Circuit decisions not at issue here and involving unrelated matters. Pet. at 8.[7]

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6. It has long been established that juries are expected to follow the law as given by the courts. *Sparf & Hanson v. United States*, 156 U.S. 51, 102 (1895); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *United States v. Gaudin*, 515 U.S. 506, 513 (1995). Thus, in both federal and California courts, the jury is presumed to have followed the instructions given by the court. *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957); *People v. McLain*, 46 Cal.3d 97, 119-120 (1988); *People v. Davis*, 10 Cal.4th 463, 542 (1995).

7. In any event, petitioner exaggerates the extent of the "mischief." In *People v. Box*, 23 Cal.4th 1153, 1188, fn. 7 (2000), for example, the California Supreme Court noted *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000) referred to a "raised an inference" standard of examining a party's claim that a peremptory jury challenge was unconstitutional, whereas in California courts a party must raise a

(continued...)

Finally, petitioner's fear that unless reviewed, the Ninth Circuit's opinion will effectively open the flood-gates to "numerous similar challenges based on alleged state-law errors," pet. at 9, is unfounded. According to *Shepard's Citations Online* subsequent history service, in the approximately nine months since *Bradley* was published, exactly one citeable case has referred to that decision, and for the unremarkable proposition that harmless error analysis applies to a trial judge's failure to instruct the jury on entrapment. *United States v. Labrada Gurolla*, 333 F.3d 944, 957 (9th Cir. 2003) ["We need not decide whether these facts, and the attendant legal theory of inducement by trickery, entitled Labrada to an entrapment instruction, because it is clear that Labrada suffered no harm by the district court's refusal to give that instruction. See *Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) ....]" Because the Ninth Circuit's opinion so clearly was predicated on a set of facts unique to this case, the decision has negligible precedential value.

B. *Whereas the scope of the Court of Appeals' opinion is limited to the facts before it, it does not conflict with decisions of other Circuit Courts of Appeals.*

1. The Ninth Circuit's opinion below simply held that, under these particular circumstances, the state trial court denied Bradley's federal due process right. Petitioner asserts the Ninth Circuit's opinion conflicts with law in other Circuits, pet.

(...continued)
"strong likelihood" the challenge had an impermissible basis. However, *Box* agreed with the Ninth Circuit that in California a "strong likelihood" means a "reasonable inference." This corollary recently was reaffirmed by the California Supreme Court in *People v. Johnson*, 30 Cal.4th 1302, 1312-1314 (2003).

at 13, yet also acknowledges that in several other Circuits "opinions on this issue go both ways," pet. at 14, thereby implicitly recognizing that the Court of Appeals' decision here at least comports with *some* other federal appellate decisions left untouched by this Court.

Petitioner largely rests his claim of conflicting appellate authority on the holding of *Johnson v. Rosemeyer*, 117 F.3d 104 (3d Cir. 1997). Pet. at 13. *Johnson* cited *McGuire*'s holding that it is not the province of a federal habeas corpus court to re-examine state court determinations on state law questions, yet recognized, under *McGuire*, that federal courts still retain supervisory authority over state judicial proceedings and may intervene to correct wrongs of constitutional dimension. *Johnson*, 117. F.3d at 109. Later that year, in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), *cert. denied sub nom District Attorney of Bucks County v. Smith*, 522 U.S. 1109, 140 L.Ed.2d 103, 118 S.Ct. 1037 (1998), the Third Circuit explained its holding in *Johnson*:

> ... *Johnson* stands for the unremarkable proposition that the states are free to define criminal offenses in any way they see fit, within certain constitutional limitations, even through their lower courts. This is so even if the definition they choose makes it somewhat easier to convict a person of the offense than would be the case under a different definition. *Johnson* most emphatically does not stand for the proposition that, once a state has defined a criminal offense, the state may then proceed to convict a person of that offense on anything less than proof beyond a reasonable doubt of all the elements of the offense. Thus, whether a state is relieved of that burden via an instruction that omits an element of that offense, materially misdescribes that element, or shifts to the defendant the burden of proof on that element, the result is the same -- the defendant has been denied his federal constitutional rights.

Id. at 415. *Smith* also observed that when the misapplication of state law by a state

court has the effect of depriving a person of life, liberty, or property without due process of law in violation of the Fourteenth Amendment, the resulting federal constitutional error can be corrected by a federal habeas court. *Id.*, 120 F.3d at 414, citing *Gilmore v. Taylor*, *supra*, 508 U.S. at 348-349 (O'Connor, J., concurring.) Thus, "once the state has defined the elements of an offense, the federal Constitution imposes constraints upon the state's authority to convict a person of that offense." *Smith*, 120 F.3d at 415.

The case at bar was not simply a case of instructional error. Here, by allowing Bradley to admit to the jury every element of the crime without providing a means of explaining or justifying his conduct, the trial court's actions not only *shifted* the burden of proof to the prosecution, they effectively *relieved* the prosecution of its burden of proof. The Ninth Circuit's finding of a due process violation is perfectly in keeping with decisional law of the Third Circuit. See *Smith v. Horn*, 120 F.3d at 415.[8]

2. Nor do the other Circuits' cases cited by petitioner represent conflicts requiring this Court's intervention. Pet. at 14. In *Wood v. Marshall*, 790 F.2d 548, 551-552 (6th Cir. 1986), the court held that because the burden of proof of the affirmative defense of insanity constitutionally may be placed on a criminal defendant, an oral jury instruction placing the burden on the defendant -- even if erroneous under

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8. Nor does the holding in *Ellis v. Hargett*, 302 F.3d 1182, 1188-1189 (10th Cir. 2002), also cited by petitioner, pet. at 13-14, conflict with *Bradley*. *Ellis* simply ruled that the defendant had not exhausted his federal due process claim in the state case, the state had not waived the exhaustion requirement, and the defendant raised only claims of state law violations.

state law -- did not violate the defendant's federal constitutional rights. This does not conflict with the Sixth Circuit's opinion in *Taylor v. Withrow*, *supra*, 288 F.3d 846, which held that the right to assert self-defense is a fundamental right and that failure to instruct on self-defense, when warranted by the evidence, violates a criminal defendant's rights under the due process clause, *id.* at 851, a question distinct from upon whom the appropriate burden of proof of that defense should lie. In both *Clemmons v. Delo*, *supra*, 177 F.3d at 685 and *Baker v. Leapley*, 965 F.2d 657, 659 (8th Cir. 1992), the Eighth Circuit, reaffirming that under *McGuire* and *Naughten* federal habeas corpus relief is not available for state law instructional error unless the instructions so infected the entire trial as to deprive the defendant of a fair trial, found insufficient defects in either defendant's trial to warrant relief under this standard. And *Tyson v. Trigg*, 50 F.3d 436, 447-448 (7th Cir. 1995), simply reasserted that a criminal defendant has a constitutional right to present witnesses in support of his defense, and that right would be empty without the right to instruction which allowed the jury to consider that defense, providing sufficient evidence existed to create a reasonable doubt of guilt in the mind of a reasonable juror.

Far from establishing conflicting appellate authority, the cases cited by petitioner suggest uniformity in this area. As the Sixth Circuit observed in *Taylor v. Withrow*,

> In finding that the right to claim self-defense is a fundamental right we break no new ground. Other Courts of Appeals have already reached the same conclusion. In a recent case Judge Easterbrook held that "[w]hen there is evidentiary support for a defendant's theory on self-defense, failure to instruct on self-defense violates a criminal defendant's Fifth and Sixth Amendment rights," *Sloan v. Gramley*, 215 F.3d 1330, 2000 WL 536164, at *3 (7th Cir. May 1, 2000), and Judge

> Richard Arnold also recently found that a criminal defendant "is entitled to a self-defense instruction if there is evidence to support his theory," *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999). This Court has also already held, as have other Courts of Appeal, that in certain circumstances refusal to instruct a jury properly on self-defense can so taint the resulting verdict as to be an error of constitutional dimension. *See, e.g., Davis v. Strack*, 270 F.3d 111, 116 (2d Cir.2001); *Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999), *cert. denied sub nom, Yukins v. Barker*, 530 U.S. 1229, 120 S.Ct. 2658, 147 L.Ed.2d 273 (2000).

Id., 288 F.3d at 852.

Indeed, the Second Circuit's holding in *Davis v. Strack*, *supra*, provides a perfect model for the case at bar. In *Davis*, the defendant admitted shooting the victim, but claimed it was justified due to past physical and sexual assaults perpetrated by the victim on the defendant. The trial court refused to instruct on the defense of justification. The Second Circuit acknowledged that under *Naughten* and *McGuire*, the question was not whether the court gave a faulty instruction, but whether the error so infected the entire trial that the resulting conviction violated due process. *Davis*, 270 F.3d at 123. The Court of Appeals held that because the defendant confessed to the killing, the trial court's ruling excluding instruction on the defense of justification -- warranted under New York state law -- completely deprived the defendant of a defense: without instruction on the defense, "the question whether he was guilty ... was thus open and shut." *Id.* at 131. The court further noted, "The effects of the court's error were to deprive Davis entirely of his defense -- on which he had a significant possibility of prevailing -- and to insure his conviction. The effect of the error was catastrophic." *Id.* at 133.

As the Ninth Circuit recognized, the error in the case at bar was equally

catastrophic: " [T]he refusal to give an entrapment instruction at the second trial, in effect, sandbagged Bradley into testifying and virtually confessing guilt, even though no entrapment instruction was given " Pet., App. A at A12, fn. 4. Given both the inter- and intra-Circuit uniformity on this issue, certiorari is not warranted in this matter.

III.

The Court of Appeals' two incidental references to juror affidavits in discussing the prejudice aspect of the case at bar do not constitute a "holding" requiring correction by this Court, as several other decisions both by this Court and the Ninth Circuit squarely address this issue.

In concluding the trial court's error was prejudicial, the Ninth Circuit primarily relied on the disparity in outcomes between Bradley's two trials:

> *[W]e need only look at the at the differing results of the two trials* to find that the failure to so instruct had a substantial and injurious effect on the jury verdict. In the first trial, an instruction was given, and a mistrial was declared after three days of deliberation and two clarifications on the defense. In the second trial, the same evidence was presented, but the instruction was not given. A guilty verdict was the result.

Pet., App. A at A12, emphasis added.

The Court of Appeals also noted that in his state appeal, Bradley filed declarations from two jurors from the second trial, attesting they would not have convicted Bradley had they been instructed on entrapment. Pet., App. A at A12. The Court of Appeals also concluded the state appellate court erred, inter alia, by failing to consider the undisputed evidence that jurors in the second trial would not have

convicted Bradley if instructed on entrapment. Pet., App. A at A14.

These two casual references to the juror affidavits hardly qualify as the opinion's "holding," as characterized by petitioner.[9] The opinion itself makes clear the court would have reached the same conclusion based on the disparity between the two trials. The information contained in the challenged affidavits was just one of many factors considered by the court, but hardly the most important.

Again, petitioner's fear that these two references to juror affidavits will let loose a deluge of challenges on this ground, particularly in capital cases, pet. at 17, is grossly exaggerated. Both this Court and the Ninth Circuit, as well as other Circuits, repeatedly have addressed this issue directly and squarely, in cases where the decisions regarding the admissibility *vel non* of juror affidavits under Rule 606(b) of the Federal Rule of Evidence actually *can* be considered the holdings. See *Tanner v. United States*, 483 U.S. 107, 121-122 (1987); *McDowell v. Calderon*, 107 F.3d 1351, 1267-1368 (9th Cir. 1997), reversed on another ground, 130 F.3d 833 (9th Cir. 1997) (en banc); *United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983); *Hard v. Burlington Northern R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989); *Abatino v. United States*, 750 F.2d 1442, 1446 (9th Cir. 1985); *United States v. Bagniol*, 665 F.2d 877, 884-885 (9th Cir. 1981); *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 366 (8th Cir. 1992); *United States v. Cappas*, 29 F.3d 1187, 1192 (7th Cir. 1994); *Silagy v. Peters*, 905 F.2d 1086, 1008-1009 (7th Cir. 1990); *Fulwood v. Lee*, 290 F.3d 663,

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9. It appears safe to say that had the court's incidental references to the affidavits constituted the egregious trespass portrayed by petitioner, Judge Graber would have addressed that fact in her dissent. Yet Judge Graber is silent on that point.

684 (4th Cir. 2002).

In light of the above cited cases, all of which directly addressed the admissibility of juror affidavits under Rule 606(b), there is no compelling reason for this court to review what clearly was an incidental and hardly dispositive reference to juror affidavits. The law on this point is clear, and requires no further clarification from this Court.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Dated: September 10, 2003

Respectfully submitted,

JEFFREY S. KROSS
Attorney for Respondent
GARY BRADLEY

Appendix A

THE COURT: YOU KNOW THAT, AND I KNOW, BUT THE LESS SAID TO THE JURY IN THIS REGARD IS OF VALUE, I THINK. SO THE SAME RULES APPLY. I DON'T SEE ANY PROBLEM WITH IT.

MR. WALMARK: I ALSO THOUGHT BECAUSE -- TO SAVE HIS VOICE, I WAS GOING TO BE DOING ALL THE READING EXCEPT --

MR. MULCAHY: I DON'T HAVE ANY PROBLEM WITH THAT.

MR. WALMARK: YEAH. I WAS GOING TO DO ALL THE READING OTHER THAN THE ANSWERS, WHICH, OBVIOUSLY, MS. HOUSEMAN WILL.

THE COURT: OKAY. SO WE ARE STARTING WITH 485 AND GOING UNTIL THE END OF HIS CROSS.

MR. WALMARK: NO. WE ARE GOING TO START AT 465.

THE COURT: NO. I MEANT MR. RUBIN. WHAT YOU WANT ME TO READ?

MR. WALMARK: YES, RIGHT.

MR. MULCAHY: YES, AND IF YOU CAN JUST STATE BEFORE YOU START THAT YOU ARE GOING TO DO THE READING OF THE QUESTIONS THAT I WOULD NORMALLY DO JUST BECAUSE OF MY VOICE, THAT'S FINE.

MR. WALMARK: SURE.

THE COURT: I AM GOING TO ALSO READ TO THE JURY, OR TELL THEM, ABOUT 2.12, UNAVAILABLE WITNESS -- WELL, THAT'S INTERESTING. I'LL JUST SAY THAT --

MR. MULCAHY: MR. BRADLEY IS NOT UNAVAILABLE. MR. BRADLEY MIGHT DECIDE TO EXERCISE HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY IN THIS TRIAL, AND IF MR. BRADLEY EXERCISES THAT RIGHT AS TO THIS TRIAL, THEN THE COURT'S CONFRONTED WITH GIVING THE INSTRUCTIONS 2.60 BECAUSE HE

DOES HAVE --

THE COURT: YEAH, BUT THEN ARE YOU OBJECTING TO THIS COMING IN AT ALL?

MR. MULCAHY: I'M OBJECTING TO IT. I WOULDN'T LIKE IT TO BE READ AT ALL, PERIOD.

THE COURT: WHAT'S THE LEGAL REASON WHY IT SHOULD NOT BE READ AT ALL?

MR. MULCAHY: BECAUSE IT INFRINGES UPON MR. BRADLEY'S CONSTITUTIONAL RIGHT TO DECIDE IN THIS CASE, AFTER THE PEOPLE ARE DONE WITH THEIR CASE, TO REST ON THEIR CASE AND TO NOT TESTIFY WHATSOEVER, AND I THINK HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT IN THIS PARTICULAR TRIAL, BASED UPON THE WAY THE FACTS COME OUT IN THIS PARTICULAR TRIAL, CANNOT BE IMPINGED BY THE PEOPLE TRYING TO READ HIS PRIOR TESTIMONY.

THE COURT: OKAY. WHAT ABOUT THAT?

MR. WALMARK: 1220, CLASSIC CASE, PRIOR STATEMENT BY THE DEFENDANT.

THE COURT: ALL RIGHT. OKAY. OVERRULED. ALL RIGHT. WE'LL BRING IN -- WHO IS GOING TO DO THE READING.

MR. WALMARK: REBECCA HOUSEMAN WILL BE MR. BRADLEY, AND I'LL DO THE QUESTIONS.

MR. MULCAHY: BUT WHAT IS THE COURT GOING TO DO WITH THE INSTRUCTION 2.20?

THE COURT: 2.12.

MR. MULCAHY: 2.12. I'M SORRY.

THE COURT: WELL, NOT HAVING GIVEN IT A LOT OF THOUGHT, THE INITIAL THING THAT I WOULD SAY TO THE JURY IS

Appendix B

YOUR HONOR.

THE COURT: ALL RIGHT. GO AHEAD.

MR. MULCAHY: 4.60, ENTRAPMENT WHEN IN DEFENSE, 4.61.5, PERMISSIBLE AND IMPERMISSIBLE CONDUCT, AND 4.61, OBJECTIVE -- ENTRAPMENT OBJECTIVE TEST AND GUIDANCE.

YOUR HONOR, IT WOULD INDICATE THAT BASED UPON THE FACT THAT MR. BRADLEY TOOK THE STAND, RELATED WHY HE DID WHAT HE DID UNDER THE CIRCUMSTANCES, FALLS RIGHT WITHIN THE OBJECTIVE TESTS. THESE INSTRUCTIONS WERE ALSO GIVEN IN THE FIRST TRIAL. THESE ARE THE INSTRUCTIONS THAT I'M REQUESTING.

THIS SITUATION IS UNIQUE AND DIFFERENT THAN MOST SITUATIONS BECAUSE OF THE MANIPULATION THE POLICE DID OF MR. FLORES, AND THERE ARE FACTORS TO SUPPORT THAT. THEY HAVE CREATED A SITUATION WHERE SYMPATHY FOR AN INDIVIDUAL, I THINK THIS IS -- I HAVE ESTABLISHED SUFFICIENT EVIDENCE BY A PREPONDERANCE FOR THE JURY TO DETERMINE WHETHER THIS DEFENSE -- WHETHER OR NOT IT'S A DEFENSE, AND I WOULD ASK THE COURT TO GIVE THOSE INSTRUCTIONS.

THE COURT: ALL RIGHT. PEOPLE ON ENTRAPMENT.

MR. WALMARK: I WOULD ALSO RESPECTFULLY DISAGREE WITH THAT. I WOULD LIKE TO SEE ONE CASE THAT EVEN COMES CLOSE TO DESIGNATED FACT THAT THIS IS AN ENTRAPMENT.

THE COURT: ALL RIGHT. DENIED. IT WON'T BE GIVEN. WE'LL THINK ABOUT THIS OTHER LESSER, AND WE'LL TAKE A BREAK.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. CONTINUING DISCUSSION ON

No. 03-249

IN THE SUPREME COURT OF THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

PROOF OF SERVICE UNDER RULE 29.5(b)

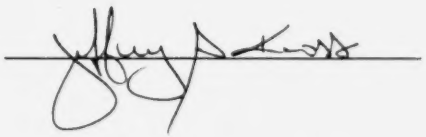
I, Jeffrey S. Kross, declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years and not a party to the within action. My business address is P.O. Box 16224, Oakland, California 94610-6224. On this date I served three copies of the enclosed RESPONDENT'S BRIEF IN OPPOSITION in said action by placing them in the United States mail at Oakland, California, addressed as follows:

Donald E. DeNicola
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013
(213) 897-2388

Counsel of Record for Petitioner, W. A. Duncan, Warden

I thereby have served all parties required to be served.

Executed this 11th day of September 2003 at Oakland, California.



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NO. 03-249

IN THE SUPREME COURT OF THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner,*

v.

GARY BRADLEY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-249

W. A. DUNCAN, WARDEN, *Petitioner,*

v.

GARY BRADLEY, *Respondent.*

Warden W. A. Duncan (the State) files this reply to respondent Gary Bradley's opposition to the petition for writ of certiorari. In its petition, the State seeks review on two questions: (1) whether a federal habeas corpus court may grant relief based on its own conclusion, contrary to that of the state courts, that state law required jury instructions on an affirmative defense like "entrapment"; and (2) whether, in harmless-error analysis, a federal court may consider the affidavits of trial jurors hypothesizing how the jury otherwise would have voted.

A. Mootness and "Equity."

1. Respondent Bradley argues that this Court should deny the State's petition for certiorari because the county district attorney's office has declined to re-prosecute him following the Ninth Circuit opinion ordering his release from prison. (Opposition Brief [Opp.] 1, 5-6.) But Bradley's argument is a non-sequitur. Despite some equivocation, Bradley himself seems constrained by the authorities he himself cites—e.g., *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)—to acknowledge that the decision not to undertake a second trial eight years after the crime does not render this case

moot. (Opp. 5-6.) See also *Mancusi* v. *Stubbs*, 468 U.S. 204, 206-207 (1972). The controversy remains live and acute: resolution of the Questions Presented in the certiorari petition will determine whether Bradley must be returned to prison under his 1997 judgment of conviction in state court, as well as whether future state criminal judgments in other cases will be enervated on the basis of federal-court intrusion into state-law questions. Otherwise, a court of appeals could practically insulate its decision from Supreme Court review simply by ordering a prisoner's release and then refusing to stay its judgment.

2. Bradley instead suggests, illogically and irrelevantly, that the State's petition should be denied for "equitable" reasons because it seeks to "undermine the policy decision of the local District Attorney's Office" not to re-prosecute him. (Opp. 5-6.) But, even if such an allegation mattered, there is no inconsistency in policy in this case. The State through its Attorney General seeks to uphold the 1997 judgment and sentence first obtained as a result of the policy decision of the district attorney to seek, in the State's name, Bradley's conviction and punishment as a "three-strikes" recidivist in the first place. For its part, the local district attorney's office has made no "policy decision" that the 1997 criminal judgment should not be enforced. On the contrary, the district attorney apparently refrained from entering into any further trial proceedings or settlement that Bradley then could cite as superseding or mooting out the criminal judgment at issue in the certiorari petition.

Regardless of Bradley's extra-record hearsay assertion about the prosecutor's reasons in his case (see Opp. 5), a local prosecutor's decision not to re-try a case eight years after the fact properly may depend upon resources, availability of witnesses, loss of physical evidence, etc. Whatever the reason, it in no way would signify a "policy decision" that the prior judgment he sought and obtained should be abandoned even where the federal court erred in upsetting it. Concerning that

judgment, the only operative "policy decision," and the only one logically relevant to this Court's certiorari discretion, is the State's decision to seek to enforce Bradley's criminal judgment through review of the Ninth Circuit's grant of habeas corpus relief.

B. Affirmative-Defense Question.

1. Also fruitless is Bradley's effort to deny that the Ninth Circuit, in violation of *Estelle* v. *McGuire*, 502 U.S. 62 (1991), allowed federal habeas corpus relief for a "mere error of state law." (Opp. 7.) The panel majority's opinion went to great lengths to explain that the state court had erred under California law in failing to instruct Bradley's jury on entrapment, and then purported to find the constitutional due-process violation on that basis. (See Petition [Pet.] 5, 11-12; Pet. Appendix [App.] A5-A9.) In rejecting a claim almost identical to Bradley's in *Gilmore* v. *Taylor*, 508 U.S. 338, 344 (1993), this Court recognized that validating a habeas corpus claim based on alleged error with respect to a state-law affirmative defense "would make a nullity of the rule reaffirmed in *Estelle* v. *McGuire*."

2. Citing *Cupp* v. *Naughten*, 414 U.S. 141 (1973), Bradley posits that some state-law errors might rise to the level of violations of the Constitution. (Opp. 8-9.) The State addressed that general point in its petition, discussing *Naughten* and explaining that, to support federal relief, the instructions in this case would have to violate the Constitution without regard to whether they also happened to violate state law. (Pet. 11.) That proposition is what gives rise to the petition's first "Question Presented." For, here, the Ninth Circuit purported to find a due-process violation merely upon its conclusion, contrary to that of the state courts, that Bradley had been entitled to entrapment-defense instructions under California law.

3. In its petition, the State also argued that the Ninth Circuit opinion further ran afoul of *Gilmore* v. *Taylor's* "new

rule" holding: that federal relief on an instruction-error claim based on a state-law affirmative defense would violate the anti-retroactivity doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989). (See Pet. 6, 10-11.) Bradley's opposition brief, however, remains completely silent on how the opinion below conceivably might be reconciled with *Taylor's* holding on the *Teague* question.

4. Bradley also fails is his effort to minimize the conflict between the Ninth Circuit's opinion in this case and the Third Circuit's opinion in the affirmative-defense case of *Johnson* v. *Rosemeyer*, 117 F.3d 104 (3d Cir. 1997). Bradley relies on the later comments in *Smith* v. *Horn*, 120 F.3d 400 (3d Cir. 1997)—comments to which the State's certiorari petition itself referred (Pet. 14)—explaining that *Johnson* did not permit the states to convict without proof beyond a reasonable doubt of the elements of the offense. (Opp. 12-13.) But Bradley's citation to *Smith* merely begs the question. The issue in this case, as in *Johnson* and as in *Taylor*, concerns affirmative defenses and not the elements of the crime. See *People* v. *Mower*, 28 Cal.4th 457, 480-481 (2002) (entrapment under California law concerns police misconduct, not the elements of a crime, and must be proved by the defendant by a preponderance of evidence).[1]

C. Juror-Affidavit Question.

Bradley last says that certiorari is unjustified on the question of whether the federal court may consider juror affidavits in harmless-error analysis. (Opp. 16-18.) He does not defend the panel's consideration of the affidavits; and, indeed, the cases he cites strongly suggest that it was indefensible under established law. Instead, he offers speculation that the panel would have found the alleged error harmless anyway, and

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1. On page 4 of the certiorari petition, the State's garbled citation to "*People* v. *Reliford*, 28 Cal.4th 647" instead should have referred to *Mower*, 28 Cal.4th 457, for this explanation of California entrapment law.

predicts that other courts will not fall into the same practice. His assurances are rather cold comfort. The panel relied on the affidavits in its own harmless-error evaluation. (Pet. App. A12-A13.) And it separately condemned as "objectively unreasonable" under 28 U.S.C. § 2254(d)(1)—a deferential habeas corpus standard of review that is supposed to make the writ harder to obtain—the state court's refusal to consider the affidavits in the state proceedings. (*Id.*, at A14.) The panel departed widely from "the accepted and normal course of judicial proceedings," see SUP. CT. R. 10(a); and, regardless of whether "incidental," the opinion's repeated references to the admissibility of the affidavits threaten further mischief in future cases.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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